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WOMAN
UNDER THE ENGLISH LAW

WOMAN

UNDER THE ENGLISH LAW

FROM THE LANDING OF THE SAXONS
TO THE PRESENT TIME

BY

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INTRODUCTION

IN the laws of every nation which has attained to such a degree of civilization as to have reduced its system of jurisprudence to writing, there are to be found certain enactments dealing especially with women, as distinguished from the general body of the people owing obedience to these laws.

To this rule we believe there is no single exception, nor can we conceive any state of society composed of men and women, whose system of jurisprudence could be such, that the same laws would apply equally to the two sexes.

As a proof of the universality of this rule, we have but to look at the three great systems of jurisprudence existing in the past, viz. the Hebraic, the Greek, and the Roman. In each of these there are numerous laws dealing with the relations of the sexes, and though these laws differ in many instances, both in

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detail and principle, their very existence remains as a proof that lawgivers in all past ages recognized that the legal status of woman was of necessity different from that of man.

It is an account of this legal position of woman in England which we have attempted to give in the following pages, placing before our readers a general outline of the law dealing with the subject.

To do this with any regard to thoroughness, it is necessary to start from a somewhat early period in the history of our laws.

If, as Lord Bacon says, 'our laws are as mixed as our language,' no period subsequent to the landing of the Saxons in Britain, can be selected as affording a reliable starting-point from which to set out upon our investigations. To follow Lord Bacon's simile, it may justly be urged, that as we have some words in our language belonging historically to the period of the Roman invasion, so too have we certain laws traceable to the Roman influence; but as the examples in both instances are few, we have not thought it necessary to include this period in the present volume.

On the landing of the Saxons in Britain,

A.D. 450, the second element of our race made its appearance, and we have therefore chosen this date as marking the commencement of our present system of jurisprudence, the elements of which are to be found in the customs which were in use amongst the majority of the Germanic tribes.

It has been our endeavour in the following pages to furnish the reader with a concise account of the laws which concern women during the period ranging from A.D. 450 down to the present day, to point out the numerous changes which have taken place in the legislation affecting the sex, and to follow the somewhat intricate path by which woman has reached the high position which she now enjoys under the English law.

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A.D. 450—1066

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WOMAN UNDER THE ENGLISH LAW

CHAPTER I

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FROM the date of the landing of the Saxons in England, about A.D. 450, down to the accession of Aethelbirght, King of Kent, one hundred and forty-seven years later, the legal historian can lay his hands upon scarcely any material from which to compile an account of the laws which governed the Saxon people during those times.

The Saxon Chroniclers, from whose pages, it is true, much of our knowledge concerning the

later Anglo-Saxons is gained, when touching this period, tell us but little save legend, and it is only from a few facts scattered through the pages of Tacitus' *Manners of the Germans*, that conjectures may be made as to the legal customs in vogue amongst our early forefathers.

During this period no written codes of laws were compiled, at least none have come down to us. What particular customs, for customs are the germs of all law, obtained we can only conjecture, by supposing that many of those which the Roman historian declares to have been common amongst the German tribes of his time, still existed, and were brought over with the conquerors to our island, and that many of the Saxon laws, which were compiled by the kings at a later date, already existed as customs at this early period.

What system of jurisprudence the Romans had left behind them in Britain, whether the Saxon laws were influenced by the Roman law, and if so, to what extent, are questions which learned legal antiquaries have sufficiently debated amongst themselves, though upon this subject nothing can be definitely affirmed.

It will be seen, then, that if any account of the legal customs of this period can be written

at all, it is to Tacitus that we must turn for information. It is true that he does not even mention the Saxons by name, yet as the customs of all the tribes were probably much the same, the account which he gives of the position accorded to the German women in the State, their marriage law and method of divorce, will be more or less true of the Saxon tribes which, under Hengist and his brother Horsa, conquered Britain.

The ancient Germans, we are told, entertained a high opinion of their women. There was, in their opinion, something sacred in the female sex, and even the power of foreseeing future events. Their advice was always listened to, they were frequently consulted, and their responses were deemed oracular. Although Tacitus makes no mention of women attending at the general assembly for the discussion of public business, it was evidently customary to consult them as to whether or not a battle should be fought. We learn from Cæsar that when he inquired of the prisoners why Ariovistus declined an engagement, he was told that it was the custom amongst the Germans for the women to decide by lots and divinations whether it was proper to hazard a

battle, and that they had declared against coming to battle before the new moon.

If in so important a matter as the above, women were consulted, the sex as a whole must have benefited by the honour conferred upon its individual members, nor is it unreasonable to suppose that the superstition with which women were looked upon by the warriors of Germany, placed them in a much higher position than was accorded to those belonging to many nations which had attained to a more lofty degree of civilization than that of the Germanic tribes.

Even at the present day the position of woman is higher in the two great Teutonic nations than in any other in Europe. The inherent domesticity of these two races, which, according to the opinion of some writers, is the secret of their success, is chiefly owing to the high place accorded to the women in the home.

Matters of household government, such as the early education of the children, the management of the servants, etc., were left entirely in her hands, and it was because she was treated with this respect, and the larger share of the government of the home given into her hands,

that she looked upon the domestic hearth as something almost sacred, to bring dishonour upon which was one of the greatest of crimes.

As to their rights of property but little if anything is known. It would appear, however, that females were excluded from the succession to the lands of their deceased father, which consisted of the piece of ground around the hut or cabin. The old rule amongst the Germans seems to have been that the land should go to the sword and not to the distaff, the daughters being excluded because they passed by marriage into other families. Such at least was the Salic law, which is founded upon the manners and customs of ancient Germany.

Of criminal laws specially affecting women Tacitus is silent. He mentions, however, that the custom of infanticide, a very prevalent one amongst savages, was looked upon as a heinous offence; the offence of procuring abortion, however, so far as we can judge, being unknown to the tribes of ancient Germany.

With but a few trifling exceptions the Germans were monogamous, polygamy being illegal. Early marriages were not allowed, but under what age marriages were forbidden

Tacitus does not say; all we are told is, that both parties must have attained to their full growth before they could enter into matrimony.

The marriage ceremony was an exceedingly simple one. In the presence of the bride's father and mother the bridegroom made a tender of part of his wealth. If she accepted this, the match was approved. She appears to have brought no portion, but received by way of dowry from her husband some oxen, a caparisoned horse, a shield, a spear, and a sword. In return for these, however, she presented the bridegroom with a present of arms, and this interchange of gifts sealed the marriage. 'This,' says Tacitus, 'is the nuptial ceremony, this the bond of union, these the hymeneal gods. Lest the wife should think her sex an exemption from the rigours of the severest virtue and toils of war, she is informed of her duty by the marriage ceremony, and thence she learns that she is received by her husband to be his partner in toil and danger, to dare with him in war, and suffer with him in peace. The oxen yoked, the horse accoutred, and the arms given on the occasion, inculcate this lesson; and thus she is prepared to live and thus to die. These are the terms of their union: she receives her

armour as a sacred treasure, to be preserved inviolate, and transmitted with honour to her sons a portion for their wives, and from them descendible to her grandchildren.'

Unfaithfulness, it would seem, was rarely heard of, but when detected, the woman was punished in the following manner. The husband cut off the hair of the guilty wife, and having assembled all her relations, expelled her naked from his house, pursuing her with stripes through the village.[1]

No matter how beautiful she might have been, no matter how rich, once having been detected in unfaithfulness she would be unable to obtain a second husband; a punishment which we shall find several centuries later, under the laws of King Aethelred, still visited upon a divorced woman.

[1] By a law of the Visigoths, if a woman were found guilty of adultery, but not taken in the fact, the husband could accuse her before the magistrate, and if the charge were supported by evidence, both the offenders were delivered over to the husband to be dealt with as he should think proper. If he killed both in the fact it was justifiable.—*Laws of the Visigoths de Adulteriis*, lex 3.

In some parts of what is now Westphalia the women pursued an adulteress with stripes from village to village, or wounding her with small knives, only desisting when the offender was at the point of death.—Alford's *Annales Ecclesiæ Anglo Saxonicæ.*

The above is all that Tacitus tells us concerning the customs of the ancient Germans which especially affect women ; yet it is probable that in a modified form most of these were brought over by the Saxons to Britain. We shall see, for instance, that the marriage gift of oxen was still customary in the time of Aethelbirght, and mentioned in his Dooms or laws, and that the nuptial ceremony was equally as simple as at this early period. We shall find that the long hair of woman, which in the case of the unfaithful wife was cut off, was still a mark of rank amongst the Anglo-Saxon ladies, and that, although the introduction of Christianity dispelled much of the superstitious veneration with which the Germans were wont to look upon their womankind, the Anglo-Saxon women still obtained no small amount of honour in their adopted country, and received careful consideration at the hands of the Saxon lawgivers.

CHAPTER II

I. POSITION OF WOMAN AS A CITIZEN
II. POSITION OF WOMAN IN RELATION TO PROPERTY

The written laws of the Anglo-Saxons—The ecclesiastical laws of Theodorus and Ecgbertus part of the Anglo-Saxon criminal law—Most of the laws affecting women as citizens, unwritten laws—An early sumptuary law—Woman's rights in regard to landed and other property—Could inherit and dispose of property.

AETHELBIRGHT,[1] King of Kent, was the first of all the Anglo-Saxon kings to reduce to writing the laws under which his subjects were to be governed. From then, up to the reign of Cnut,[2] we find numerous codes of laws issued by successive kings, many of them, it is true, containing repetitions of former enactments, yet, when taken as a whole, casting not a little light upon the system of laws under which the Anglo-Saxon people lived.

Not only have we these numerous kings'

[1] A.D. 597. [2] A.D. 1017.

'Dooms' or codes of laws, but what, for our purpose, is even of more value, the ecclesiastical laws of Theodorus and Ecgbertus.

Previous to the reign of King Aethelbirght, the Anglo-Saxons still held the religion of the ancient Germans. During the reign of this king, however, Augustine visited England, and succeeded in converting the inhabitants of the kingdom of Kent to Christianity. With the exception of a few temporary checks, the new religion made rapid headway, and the power of the ecclesiastics began to make itself felt. Little more than fifty years later, Theodorus Archbishop of Canterbury compiled a code of ecclesiastical laws, which in A.D. 734 was followed by another code promulgated by Ecgbertus Archbishop of York; which two codes formed the bulk of the ecclesiastical law which was current amongst the Anglo-Saxons.

In his *History of the Criminal Law*, Mr. Justice Stephen tells us that probably the clergy were never more powerful in any time or country than they were in England before the Norman Conquest, and though the ecclesiastical law exerted jurisdiction over laymen down to the seventeenth century, yet every year after the Norman Conquest saw its powers

gradually but surely curtailed, until in the year 1640 this jurisdiction over laymen was virtually abolished.

But during the sixth century civil and ecclesiastical legislation went hand in hand, and by far the greater part of the marriage law, and not a little of what is now criminal law, fell within the jurisdiction of the Bishop who presided over the Court Christian.

Considering the low state of civilization which existed amongst the Anglo-Saxons, it is not surprising that we find but few, if any, enactments affecting the position of woman as a citizen, for it is only in a complex state of society that the legislature is called upon to make laws which give special rights to women. Thus it is that most of our knowledge as to woman's rights as a citizen at that time is gained indirectly. For instance, there is no law as to the Anglo-Saxon Queen's right of coronation, yet we learn from many sources that she was crowned as well as the King. We can lay our hands upon no enactment which determines the constituent members of the Wittenagemot, or Anglo-Saxon Parliament, yet we are told that the Queen had a place therein, as well as a right to sign some charters

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either with, or without, the addition of the King's name.

With women generally it was the same. Some writers assert that women were actually admitted to the parliament, though they have not specified in what capacity, whether as legislators or spectators only. It is certain, however, that they were permitted to sue and to be sued in the courts of justice, and we shall see that their persons, safety and liberty were protected by express laws.

Of special laws affecting woman as a citizen we find no mention, but something analogous to a sumptuary law appears in the Dooms of Aethelbirght, wherein is mentioned 'a free woman *loc-bore*.'

Now, so far as one can gather, this law applied to a woman who was entitled by her rank to wear long hair. If such be the explanation, it would seem that all women were not *loc-bore;* but we are left totally in the dark as to the necessary qualifications which conferred this right upon a woman, and the penalties, if any, which a woman lacking the necessary qualifications incurred through wearing long hair.

As to their rights in landed property, we are

in this difficulty, we are unable to say what particular tenure of land existed amongst the Anglo-Saxons.

The best authorities appear to be of opinion that it was a system analogous to the feudal system, but whether the lord had the rights of guardianship and marriage (that is the right of forcing his female tenant under the age of fourteen to marry whomsoever he would, or if she refused his choice, to seize and enjoy the profits of her lands until she was twenty-one years of age), we are unable to say. Lingard appears to be of opinion that the Saxons occasionally claimed the wardships of heiresses, and disposed of them in marriage, citing as a proof of this, one of Cnut's laws which declares—'Let no one compel either woman or maiden to him whom she herself dislikes, nor for money sell her, unless he is willing to give anything voluntarily.'

But however this may be, it is certain that Anglo-Saxon ladies both inherited and disposed of property. We find an account of a wife who devised lands by her will, with the consent of her husband in his lifetime. We frequently find mention of wives being parties to a sale of land, while the sale of land and its disposal by will, by widows, was of common occurrence.

That women were allowed to inherit land may be gathered from a case mentioned by Ingulfus, wherein there being no male heir the estate went to a female, while in the Doomsday Book the names of many women appear as tenants-in-chief.

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CRIMINAL LAWS AFFECTING WOMAN

Woman, though not specially mentioned, amenable to the general criminal law—The ecclesiastical theory of penance—Penances and excommunication—Criminal laws affecting women—Offences against the person—Homicide—Abduction, abortion, concealment of birth—Overlaying children—Rape—Indecent assault—Bigamy—Offences against property—Larceny—'Leswe'—Offences against morals and public convenience—Witchcraft—Lewdness—Incest.

ALTHOUGH in many of the laws contained in the codes made by the Anglo-Saxon kings, women are not mentioned, it is only reasonable to suppose that most of these, especially those dealing with criminal offences, applied to women as well as to men.

Thus, for instance, if a woman committed murder, she was equally with a man bound to pay the price of the murdered person's 'wer,'[1]

[1] The 'wer' was the legal valuation of an individual according to his situation in life. If he violated certain laws it was his legal mulct. If he were wronged by another, it was often the amount payable to him by way of damages.

while in the event of her wounding any one, she was bound to make compensation according to law.

But it is rather with special criminal enactments touching women that we intend to deal, and not only with those punishing women for offences—such as the laws against witchcraft and abortion, but with those protecting her, such as laws against the offence of rape, abduction, and indecent assault.

As, however, we shall have frequent occasion to cite the ecclesiastical laws of Theodorus and Ecgbertus in the following chapters; and the punishments for almost all offences under the ecclesiastical law, being penance, we will give a short account of the various penances inflicted during this period.

Penances, say the old ecclesiastical writers, are imposed in various ways, and for this reason, because that he who sins with the body may be also punished in the body.

The chief penance inflicted by the Church was that of fasting, though this imposition led indirectly to many others, as the offending party was allowed to compound for the fasting, by doing certain acts which the Church accepted in lieu thereof.

If, for instance, a woman were for some offence ordered to fast for one day, she still might enjoy the luxuries of the table, provided she said fifty psalms with genuflections, or the whole *psalterium* without genuflections, or even by paying the sum of one penny.

A fast of twelve months might be compounded for on payment of thirty shillings, while even a seven years' fast could be compounded for in twelve months, if every night and morning she sang through the *psalterium*, in addition to chanting a fifth of it at eventide.

As an example of how easy it was for the rich to escape from ecclesiastical punishment, the following hint for avoiding penance, which the Church itself gives, will show.

A powerful man and one rich in friends, we are told, might, with the support of his friends, greatly lighten his penance. If his punishment were seven years' penance, he was to act in this way. After confessing his sins, he was to lay aside his weapons and vain ornaments, take a staff in his hand, go barefoot, and put on next to his skin woollen or hair-cloth, and for three days he was not to come to a bed. He was then to take twelve men, and let them fast during these three days on bread and green

herbs and on water. In addition to these he was to obtain, in whatsoever manner he could, one hundred and twenty more men, who were also to fast for him three days, 'and then there will be fasted as many days as there are in seven years.'

Another method of getting over the difficulty of fasting, was for the penitent to endow churches, give alms, free all his slaves, and purchase the freedom of the slaves of others, as well as to build bridges for the general benefit of his fellow-creatures.

Other penances consisted in going long journeys, and never staying at one place for longer than one night, while in every church passed on the route, the offender was to enter and publicly confess his sins.

Of flogging, neither of the archbishops make mention. Abstaining from warm baths, however, is given as a penance, as is also the taking of cold ones, 'for the cooling of all sinful lusts,' while the generally conceived idea of penance with the attendant white sheet and candle appears to have been introduced at a much later date than this.

Excommunication, another ecclesiastical punishment, had the effect of either cutting off

the excommunicated person from converse with the Church, or else of putting him outside the law, so that he was deprived of his civil rights, and was unable to do any legal act.

Let us now go back and take the laws especially affecting women, and coming under the head of offences against the person, starting with the crime of homicide.

Homicide.—In addition to the general law against murder appearing in most of the Dooms of the Anglo-Saxon Kings, there is contained in the *Liber pœnitentialis* of Theodorus a special enactment dealing with this crime when committed by a woman. Here we are told that if a free woman, with malice killed any one either by poison or any other art, the Bishop was to condemn her to eight years' penance, which was to be decreased to five years if the offender belonged to the poorer class.

Again, if a mother killed her own son, she was punished with fifteen years' penance, which penance was to be strictly performed, though, as in the former case, if she were poor, she was let off with eight years.

It would appear that a woman might with safety whip her female slave, yet, if in her anger, she flogged her so unmercifully that

death ensued, she was liable to punishment, which, however, varied according as to whether she did it with malice or accidentally. If she did it accidentally, the only punishment visited upon her was that she was to abstain from communion for a few days and perform a slight penance, but if maliciously, the Bishop ordered her seven years' penance.

King Aethelbirght also seemed to be of opinion that the death of a female slave occasioned through her master's violence was not after all so great a matter, for he says, 'He who smiteth his own female slave, and she die not on the same day, though she live but two or three nights, he is not altogether so guilty, because it (she) was his own property, but if she die the same day, let the guilt rest on him.'

To the credit of the Church, it must be said that she did invariably, by laws as well as by exhortation, endeavour to point out to the laymen the inhumanity of slavery. We find an example of this in the two laws dealing with the killing of a female slave, just cited. According to the civil law, the master's guilt depended upon the fact of the slave dying on the same day as the fatal blow was given, the question whether the punishment was excessive

and given with a view to killing the slave being ignored, chiefly because *it* was his own property.

Not so the ecclesiastical law, which was more enlightened, and placed the guilt upon the mistress provided she corrected a slave so mercilessly as to kill her, and evidence was forthcoming that she had done so maliciously.

If, however, a master, and probably also a mistress, struck out the eye of a female slave, the slave regained her liberty by way of compensation for the injury.

Before leaving the subject of homicide we may mention that in one of King Alfred's Dooms there is an enactment declaring that: 'If a man kill a woman with her child, while the child is in her,' he is to pay for the woman her full 'wer-gild,' and pay for the child half a 'wer-gild,' according to the 'wer' of his father.

Abortion.—Under the codes of the kings this offence is not mentioned, but the ecclesiastical laws certainly took cognizance of it. In the laws of Theodorus we find that if a woman killed her unborn child by any means, she was ordered to undergo ten years' penance, but if she made away with the child after birth the

offence was more serious, being, in fact, that of murder, and the punishment was fifteen years' penance.

Concealment of Birth, etc.—This was also punishable, even though the child still lived, the punishment being that in the event of any one slaying it, the parents lost the price of the 'wer,' while women who overlaid their children were liable to perform penance under the ecclesiastical law.

Abduction.—A law of Aethelbirght's says: 'If a man carry off a maiden by force let him pay fifty shillings to the owner, and afterwards buy the object of his will of the owner.'

The object of this law, it would seem, was rather to guard the owner than the maiden, and prevent him from being defrauded. The latter part of the enactment, which says, 'and afterwards buy the object of his will of the owner,' would lead one to suppose that the abduction in this case is presumed to be committed with a view to matrimony, for the terms buying a wife, and marrying a wife, are in Anglo-Saxon synonymous.

The following law we will also place here, although, like the former, it deals perhaps more with a civil injury than with a crime. It is a law

of King Alfred,[1] and runs: 'If any one deceive an unbetrothed woman and lie with her, let him pay for her, and have her afterwards to wife. But if the father of the woman will not give her, let him render money according to her dowry.'

What the exact meaning of the word deception, as here used, may be, it is difficult to say. It might be equivalent to seduction under promise of marriage. If, however, it was the ordinary deception of an unscrupulous lover, it would seem that couples detected in illicit amours would in many cases be forced into marriage, provided the fathers were willing to receive the men as sons-in-law.

It is not surprising that the law both civil and ecclesiastical visited the abduction of a nun with heavy penalties. By one of King Alfred's laws it is enacted that 'if any one carry off a nun from a minster without the King's or the Bishop's leave, let him pay one hundred and twenty shillings, half to the King, half to the Bishop and to the Church hlaford,[2] who owns the nun. If she live longer than he who carried

[1] A.D. 871—901.

[2] Some pecuniary fine; the exact meaning of the word is not known.

her off, let her not have aught of his property. If she bear a child let not that have of the property more than the mother. If any one slay her child let him pay to the King the maternal kindred's share, to the paternal kindred let their share be given.'

It would seem by this law that in the event of the slaying of a child, begotten of a nun and her abductor, the 'wer' was payable, if the father were dead, not to the mother, but to the paternal kindred, the maternal kindred receiving nothing. The property of the nun's abductor went neither to the nun nor to her child, but, like the 'wer,' probably to the paternal kindred.

Rape.—This offence, which under our present system of laws ranks in its gravity next to murder, was, under the Anglo-Saxon laws, punishable only by fine. This is not to be wondered at when we consider that even murder itself under the majority of the codes was punished by a pecuniary mulct only.

Under King Alfred's laws if a man committed a rape upon a ceorl's[1] female slave, he was bound to pay damages to the amount of five shillings to the ceorl, and an additional fine of sixty shillings to the King.

[1] A free man of ignoble rank.

If a male theow[1] committed a rape upon a female theow, mutilation followed, and no pecuniary fine could save him.

A rape upon a woman under age,[2] was likewise a subject for fine, but the fine, we are expressly told, was to be that of a full-aged person.

Rape was also an offence under the ecclesiastical law, but five years' penance was deemed sufficient punishment for a rape upon a widow or a virgin.

Indecent assault.—The lawgivers of the Anglo-Saxons were careful to distinguish the various grades of indecent assaults, and to apportion to each its particular fine.

Thus in King Alfred's laws we are told, 'If a man seize hold of the breast of a ceorlish woman,' he was fined five shillings, which sum was paid to her.

If he 'threw her down but did not lie with her,' the fine was ten shillings, but if she had previously strayed from the path of virtue, then the fine was to be half the above sum. In case the woman assaulted was more nobly born, the

[1] A slave.

[2] Either sixteen or thirteen years of age, probably the latter.

fine was increased according to the amount of her 'wer.'

In another Doom we read: 'If any one with libidinous intent seize a nun either by her raiment or her breast, without her leave,' then the fine was to be double.

Offences against property.—Larceny is the only offence against property wherein any special enactments were made dealing with this offence when committed by a woman.

If under certain circumstances, according to a law of Aethelstan,[1] a free woman was convicted of theft, she was ordered to be either thrown from a height, or else to be drowned, whilst if a female slave stole aught from any but her master or mistress, she was seized by eighty other female slaves, each bearing a log, and these were piled round her, and she was burnt to death.

There is a law of Aethelbirght to which we have before referred, viz. 'If a free woman *loc-bore* commit any leswe, let her pay a fine of thirty shillings.'

What the meaning of this law is, unfortunately we are unable to say. Thorpe appears to think it has relation to fraud of some kind or other,

[1] A.D. 924.

or it may mean any false action, such as pilfering, obtaining property by false pretences, or even acting falsely towards any one.[1]

Offences against morals and public convenience.

Witchcraft.—When we consider the superstitious veneration with which the ancient Germans looked upon their womankind, it is not surprising that we find the offence of witchcraft a very prevalent one amongst the Anglo-Saxons.

The first prohibitive law against witchcraft is found in the ecclesiastical law. Here the offence of making incantations or offerings to devils was punished by a year's penance, with its attendant fasting and other punishments.

If, in order to work a spell or charm, a woman put her daughter upon the housetop, or in the oven, or attempted to cure a sick child by charms or drawing it through the earth, the punishment was seven years' penance, for although the ecclesiastical authorities pointed out to laymen that much of the witchcraft was mere idle superstition, the good bishops believed sufficiently in the power of evil spirits to legis-

[1] Chaucer in the *Canterbury Tales* uses the word *Lesing*, meaning a lie or fraud, and this is possibly a later form of *leswe*,

late against the offence of holding communication with them.

By King Alfred's Dooms, women who were wont to receive enchanters, and workers of phantasms and witches, were not to be allowed to live; while in Edward the Elder's laws, all witches and diviners were ordered to be driven from the country, unless they desisted from their nefarious practices and paid heavy fines, similar penalties being threatened against witches, soothsayers, and morth-workers[1] by King Edmund.

Lewdness.—Illicit intercourse between the sexes was, under certain circumstances, punishable by the laws of the Anglo-Saxon kings. Fornication with a nun was made by one of King Edmund's laws punishable by denying the guilty parties Christian burial, while a law of Aethelred distinctly classes prostitution with soothsaying and witchcraft, and threatens the offenders with death unless they desist and pay heavy fines.

But it was chiefly the ecclesiastical law which

[1] Amongst the different kinds of witchcraft known to the Anglo-Saxons we find *Liblac*, which consisted in the compounding and administering drugs and philtres. Morth-workers, or worshippers, were literally people who worshipped the dead, akin to spiritualists.

took cognizance of offences of this kind, punishing illicit intercourse between the sexes by penance according to the age and condition of the parties.

A widow, for instance, who took to a loose course of life was punished with three years' penance, as was also a daughter who allowed her lover to visit her at her father's house.

An illicit amour between a Christian woman and a Jew was severely punished. If she received gifts from the Jew she was separated from the Church for one year, after which she was to undergo nine years' penance. If, however, a child was born of the connection the penance was twelve years. If the offence was committed with an unbeliever, other than a Jew, the penance was seven years, 'unless thereby,' says the worthy Archbishop, 'it should chance to happen, as the Apostle says, an infidel should be converted and saved by a woman holding the true faith.'[1]

It was likewise an offence to seduce the

[1] For an account of the offences which the ecclesiastical law was in the habit of punishing, see *Liber Pœnitentialis Theodori*, wherein we are told *inter alia*, 'Mulier qualicunque molimine aut cum seipsa aut cum altera fornicans iii. annos pœniteat. Mulier quæ se fornicationis amore ad alteram conjunxerit septem annos pœniteat,' etc.

female slave belonging to another, the seducer, if ordained, being driven from the Church, and if a layman, being excommunicated, a fate which awaited all those who procured women and girls by false and fraudulent means.

Incest, which even to this day is an ecclesiastical offence, was severely punished, the different degrees of crime and their respective punishments being carefully set down.

Cnut in one of his laws fined any one guilty of incest the amount of the wer, together with the confiscation of all possessions. The fines, as well as the penances imposed by the Bishop, varied as to the degree of the crime.

Bigamy, although casually mentioned in one of the laws of King Aethelred, is not otherwise mentioned as an offence in the kings' codes. The ecclesiastical law, however, declared that if a layman put away his wife and took another, he was to be punished by eight years' penance.

It will be seen from the above enactments that the protection of women was a branch of legislation not altogether unknown to the Anglo-Saxon law-makers, both lay and ecclesiastical.

The laws dealing with what we now term offences against morals, and which we no

longer place in the category of crimes, fell, as such laws invariably do, grievously upon the poor, but the rich, who could compound for them by a money payment, probably felt them but little.

Yet this system of espionage by the Church upon the domestic shortcomings of her lay daughters, undoubtedly formed part of the criminal law of the period. The Bishop of the Diocese and the Sheriff sat together in the County Court, the presence of the Bishop adding weight and reverence to the Sheriff's proceedings, while the Sheriff's authority was used to enforce obedience to the Bishop's decree on such refractory offenders as would otherwise have despised the thunder of mere ecclesiastical censures.

CHAPTER IV

WOMAN IN PRIVATE RELATIONS

Daughter—Power of parent to sell his daughter into slavery —Age at which parental control ceased—Wife—Early Anglo-Saxon marriage a commercial bargain—Laws dealing with the betrothal of a maiden—An Anglo-Saxon marriage settlement — Custody of the children — The Anglo-Saxons a monogamous race—Laws against marrying within certain degrees of consanguinity—Widows to remain husbandless for twelve months—The *mund* of widows—The wife's subjection to the husband—Liability of an innocent wife to be punished for the crimes of her husband in early times—This abolished by Kings Aethelstan and Cnut—Her liability to be sold as a slave if she had guilty knowledge of her husband's theft.

UNFORTUNATELY but little is known as to the position and rights of the daughter in the Anglo-Saxon family circle.

So great was the parental power, however, that up to the age of sixteen[1] a father could sell his daughter into slavery. One of King Alfred's laws deals especially with this, and although impressing upon the parent the fact that even

[1] ? thirteen.

though a slave, she is none the less his offspring, it declares this right of sale undoubtedly to belong to parents.

The words of the law are as follows: 'Though any one sell his daughter to servitude, let her not be altogether such a theow as other female slaves are. He ought not to sell her away among a strange folk. But if he who bought her reck not of her, let her go free among a strange folk.'

'If, however, he allow his son to cohabit with her, let him marry her, and let him see that she have raiment and that which is the worth of her maidhood, that is the dowry, let him give her that. If he do unto her none of these things let her be free.'

The ecclesiastical, as well as the civil law, gave this right of sale to the parent; expressly stating that up to the age of sixteen, a girl was in the power of her parents, but that after that age her parents could not force her into a marriage against her will; and that she had arrived at years of discretion, being competent to make a vow, and to enter the Church.

Wife.—The earliest written law of the Anglo-Saxons dealing with marriage is one contained in the Dooms of King Aethelbirght.

As is usual amongst barbarians or semi-barbarous nations, the law of marriage is of an extremely simple nature, marriage being viewed in the light of a commercial transaction only, a view which even the law at the present day somewhat favours, by treating marriage as a civil contract.

The feelings of the bride, in early times at least, appear to have been but little considered, provided her parents were satisfied that the match in question was, from their point of view, a satisfactory one.

'If a man buy a maiden with cattle,' says the law, 'let the bargain stand if it be without guile; but if there be guile, let him bring her home again, and let his property be restored to him.'

We may gather from this that the early marriage amongst the Anglo-Saxons was but little more than a commercial bargain. The bride was taken from her father's house, and so many head of cattle were left in her place. Provided the cattle were sound the bargain stood, but if they were diseased, or maimed, the cattle were driven back to the husband, and the maiden was received again into the family circle.

It is also probable that if the suitor had been imposed upon as to his future wife he too could

rescind the contract, return the daughter to her parents, and reclaim his cattle.

We will pass over a short law contained in the Dooms of Ine, which we will mention hereafter, and proceed to the marriage laws of King Edmund, made some three hundred years later. We shall find that under this law the arrangements for betrothal and matrimony were much more complicated, resembling, in many respects, the marriage customs of even our own time.

1. If a man desire to betroth a maiden or a woman, and it be so agreeable to her and her friends, then it is right that the bridegroom, according to the law of God, and according to the custom of the world, first promise and give a wed[1] to those who are her forespreças,[2] that he desire her in such wise, and that he will keep her according to God's law as a husband shall his wife, and let his friend guarantee that.

2. After that it is to be known to whom the foster lean[3] belongs, let the bridegroom again give a wed for this, and let his friend guarantee it.

3. Then after that let the bridegroom declare what he will grant her in case she choose his

[1] A pledge. [2] Those acting for her.
[3] Money pledged to the bride's family.

will, and what he will grant her if she live longer than he.

4. If it be so agreed, then it is right that she be entitled to half the property, and to all if they have children in common, except she again choose a husband.

5. Let him confirm all that which he had promised with a wed, and let his friend guarantee that.

6. If they are agreed in everything then let the kinsman take it in hand, and betroth their kinswoman to wife to him who deserved her, and let him take possession of the borh, who has control of the wed.

7. But if a man desire to lead her out of the land into another thane's land, then it will be advisable for her that her friends have an agreement, that no wrong shall be done to her, and that if she commit a fault, that they may be nearest in the 'bot' if she have not whereof she can make bot.

8. And the nuptial here shall be a mass-priest by law, who shall with God's blessing bind their union in all prosperity.

Such were King Edmund's[1] laws governing the betrothal of a maiden. The first important

[1] A.D. 940.

point which we notice is the pledge, which the bridegroom is required to give to the foresprecas, or those acting on behalf of the bride; that he will take her as his wife, and treat her with due kindness and respect.

The next step was to settle who was the right person to whom the foster lean, or the money pledged to the bride's family at the time of betrothal, belonged, and for the husband to give a pledge for this, as well as a guarantee entered into by some of his friends.

This being satisfactorily arranged, he had to declare what he intended to give her, either in goods, land, or money, for having chosen to be his wife: as well as what he would leave her if she chanced to survive him.

The first of these gifts was known as the morgen-gifu, and was a present which the wife received from her husband on the day following the nuptials. Sharon Turner thinks it was intended as a compliment to the lady for having honoured the suitor with her preference, and for submitting to the duties of wedlock. The same author gives, in his *History of the Anglo-Saxons*, an example of what may be termed an Anglo-Saxon marriage settlement, which is not without interest—

'There appears in this writing the compact which Wulfric and the Archbishop made when he obtained the Archbishop's sister for wife. It is that he promised her the land at Ealtre-tune and Rebbedforda for her life, and promised her the land at Cruhtewica, that he would obtain it for her for the lives of three men from the monastery at Wincelcumbe, and he gave her the land at Eanulfin-tune, to give and to grant to those that were dearest to her during life, and after her life to those that were dearest to her, and he promised her fifty mances of gold and thirty men and thirty horses.'

'Now of this were to witness Wulfstan the Archbishop, and Leofwin the Ealdorman, and Aethelstan Bishop, and Alfred Abbot, and Briteh monk, and many good men in addition to them, both ecclesiastics and laymen, that this compact was thus made; now of this compact there are two writings, one with the Archbishop of Wifere-ceaster, and another with Aethelstan Bishop of Hereford.'

It would appear by section four of the above laws, that the wife was entitled to half the husband's property, on his death, and to all of it, if they had children in common, except she

chose to marry again. By contract before marriage the husband might increase the legal share of a wife, viz. one-third, to as much as one-half, whilst if she had a child by him, and yet continued his widow, to all his goods. If, however, there was no child, as we shall see hereafter, or if he had endowed her before marriage, one-third only of his goods passed to her.

If both sides were agreed as to the provision made for the bride, the maiden was then betrothed,[1] and the person to whom the pledge was plighted by the husband, and who had both the disposal of it when made good, and the right of claiming it if withheld, entered also into a counter agreement with the husband on behalf of the wife.

If, however, the husband intended to live in some other part of the country, he entered into an agreement with his wife's friends, and covenanted that, although he was no longer living amongst them, he would still treat her kindly and let no wrong happen to her, whilst arrangements were made that in the event of her breaking any law and being fined, they

[1] Marrying a betrothed woman to another was an offence, and punishable.

would pay the fine for her, if she were unable to do so herself.

The final stroke was put to the business by the marriage ceremony, at which a mass-priest officiated, and the parties became man and wife.

In many points the above law of King Edmund for betrothal and marriage resembles the modern service for solemnizing matrimony contained in the Book of Common Prayer.

In the old Saxon law the husband agrees to take his bride 'and keep her according to God's law, as a husband shall his wife,' words which in effect are the same as those in the question, 'Wilt thou have this woman to thy wedded wife, to live together after God's ordinance?'

Like the bridegroom of to-day, the Anglo-Saxon bridegroom endowed his wife with 'all his worldly goods,' and confirmed his promise with a '*wed*' or pledge.

At the present day this wed is represented by the ring; in fact it is called the *wed*ding-ring, or plighting-ring. As such, it appears, the Church looks upon the 'ring,' for after the parties are married, the minister reads the following: 'Forasmuch as *M* and *N* have consented together in holy wedlock, and have wit-

nessed the same before God and this company, and thereto have given and *pledged their troth*, either to other, and here declared the same by giving and receiving a ring.'

At the conclusion of the modern ceremony the minister blesses the bride and bridegroom, as was the custom some nine hundred years ago, when the mass-priest was ordered by God's blessing to bind the couple's union in all prosperity.

Of customs similar to those in the Anglo-Saxon marriage law we have two examples still remaining. The friend of the bridegroom, who guaranteed that the bridegroom should carry out the pledges which he had given, is probably the original of the best man at the wedding of to-day, while the foresprecas are probably represented at the present day by those who give the woman away in marriage.

We will now go back to some of the earlier laws touching marriage.

In King Aethelbirght's laws we find it already laid down that if a wife bore a living child, half of the property was to go to her, if she outlived her husband.

If she wished, however, to go away with the children, she still was to have half the property;

but if the husband wished to take the custody of the children, her portion was to be equivalent to that of one child.

If no child was born of the marriage the fioh, or portion brought by the wife to the husband, as well as the morgen-gifu, went to her paternal kindred.

Again, by the laws of Ine, if a man bought a wife, but for some reason or other the marriage did not take place,[1] he was still bound to pay the money which he promised, in addition to indemnifying the person who had guaranteed that the contract should be carried out.

With regard to the custody of the children of the marriage, we are told by one of Ine's laws that if a ceorl and his wife had a child, and the husband died, the mother had the custody. Six shillings (? a year) was allowed for its bringing up, together with a cow in summer and an ox in winter, while the kindred were to take care of the frum-stol, or paternal dwelling-house.

Like the early Germans, the Anglo-Saxons were not allowed more wives than one; nor could they marry within certain degrees of consanguinity.

[1] Presumably through his fault.

In Aethelred's Dooms the following law is laid down—

'And let it never be said that a Christian man marry within the relationship of six persons in his own kin, that is within the fourth degree, nor with the relict of him who was so near in worldly relationship, nor with the wife's relation whom he before had had, nor with any hallowed nun, nor with his grandmother, nor with one divorced let any Christian man ever marry nor have more wives than one.'

Widowers were allowed to marry one month after the death of their wives, but according to the ecclesiastical law a Christian should not marry more than twice. If, however, he did, he was forced to do penance each time he contracted a fresh alliance!

Widows were legislated for more carefully. In the first place they were not allowed to marry until twelve months after the death of their husbands. Cnut's law on this point declares: 'And let every widow continue husbandless twelve months, let her then choose what she herself will, and if she within the space of a year choose a husband, let her forfeit her morgen-gifu and all the possessions she had with her first husband, and let the nearest

kinsman take the land and possessions which she had before. And let him (the husband) be liable in his "wer" to the King, or to him to whom he may have granted it. And though she be taken forcibly, let her forfeit the possessions unless she be willing to go home again from the man and never again be his.'

As to widows remarrying, we find the following in Aethelbirght's laws: 'If a man carry off a widow (for the purpose of marriage), not in his own tutelage, let the "mund" be two-fold.'

Now the 'mund,' it would appear, was a sum paid to the family of a bride for transferring the tutelage which they possessed over her to the family of the husband. Thus the 'mund' of a widow of the best class of an eorl's degree was fifty shillings; of the second class twenty shillings, and so on down to six shillings. If then a man married a widow, without the consent of those in whose tutelage she was, he was bound to pay to them twice the amount of the 'mund.'

Before leaving the subject of marriage we might notice the general position of a married woman with regard to her husband.

That she was to a certain extent under his subjection may be gathered from the fact, that

it is expressly set down in the ecclesiastical law, that without his leave she was unable to make a vow. Whether he had a right of personally chastising her, for misbehaviour, as he undoubtedly had later, and of forcing her to cohabit with him, the laws do not tell us.

Judging from several enactments contained in the Dooms, it would seem that the wife was often in early times made to suffer, through the misdeeds of her husband.

It was for this reason that King Aethelstan made a law which provided, that if the wives of murderers, remaining in the country, could prove that they had no hand in the murder, they were allowed to retain all which they had received in marriage, nor were the children of the murderers to be outlawed, but allowed to inherit in the usual way.

Cnut too has a law upon this subject—

'And if any man bring a stolen thing home to his cot, and he be detected, the owner shall have it, and unless it has been brought under his wife's key-lockers let her be clear; for it is her duty to keep the keys of them, viz. her "hord-ern" (store-room), and her chest and her "tege" (cupboard). If it be brought under any of these, then is she guilty. And no wife

may forbid her husband that he may not put into his cot what he will. It was ere this that the child which lay in the cradle though it had never tasted meat was held by the covetous to be equally guilty, as if it had discretion, but henceforth I most strenuously forbid it.'

If, however, the husband stole with the knowledge of his wife and family, the wife as well as all the children above ten years old were liable to be sold as slaves.

CHAPTER V

DIVORCE, ETC.

Separation allowed by ecclesiastical law—Separated parties not allowed to marry again during lifetime of each other—In cases of desertion husband allowed to re-marry, or if wife taken away captive—Nullity of marriage—Divorce—Damages for adultery—Cnut's law against adultery—Ecclesiastical punishments for adultery less rigorous—Husband allowed to divorce wife for adultery—This relief not granted to women.

SEPARATION.—Amongst the codes of laws made by the Anglo-Saxon kings, we find no enactment dealing with this subject. Under the ecclesiastical laws of Theodorus, however, it is laid down that if a husband and wife wish to separate they may do so, provided they be both of the same opinion.

This separation, like the judicial separation of our own time, did not give either of the parties the right of entering into another marriage, so long as both were living. In the event, however, of a wife deserting her husband because 'she despised him and was

unwilling to return,' the husband could under these circumstances, after a lapse of five years, with the consent of the Bishop, marry again.

He might also marry again, if, as often happened in those times, his wife were taken away in captivity, and he was unable to recover her. Even then the law required him to wait for seven years before he took another wife, whilst if by any chance the first wife regained her liberty, and returned, she, and not the second, was his lawful consort.

It may be pointed out that the time, viz. seven years, which the husband was required to wait before he could marry again, is the same as contained in the statute which now deals with the offence of bigamy. There it is enacted that a person marrying a second time, whose husband or wife shall have been continually absent for the space of seven years immediately preceding the second marriage, and shall not have been known by such person to be living within that time, such person shall not be guilty of bigamy; but, as in the old ecclesiastical law, the courts would decree, that in the event of the first wife returning, the second marriage would be void.

Nullity of marriage.—Non-consummation of

the marriage, under the ecclesiastical law, was sufficient to entitle the wife to a decree of nullity, and she was allowed to marry again.

Divorce.—The earliest law dealing with adultery in the Anglo-Saxon laws is one of King Aethelbirght, and declares that if a freeman lie with a freeman's wife, he shall pay to the husband the amount of his 'wer,' and with his own money provide another wife and bring her to the other (man): so that this law contained, though in a small compass, all the redress which a petitioner can obtain at the present day.

By it the husband was divorced from his guilty partner, he obtained damages, and leave was given to him to marry again. As a matter of fact it went further than this, for it forced the co-respondent to obtain another wife for him, thus increasing the pecuniary mulct which the law laid upon him.

Under King Alfred's law, the damages for adultery varied according to the position of the wife. If she were married to a twelve hynde man[1] the damages payable to the husband were one hundred and twenty shillings; if of a six

[1] The highest class of Anglo-Saxon aristocracy. A man whose 'wer' was twelve hundred shillings.

hynde man, one hundred shillings; if of an eorlish man, forty shillings.

If a betrothed woman committed adultery, if she were of eorlish degree, the bridegroom's surety was to be paid sixty shillings; if of six hynde degree, a hundred shillings; and so on in proportion.

Under Cnut's law the punishment visited upon an unfaithful wife was severe. 'If during her husband's life,' runs the law, 'a woman lie with another man, and it become public, let her afterwards be for a worldly shame as regards herself, and let her lawful husband have all that she possessed, and let her then forfeit both nose and ears; and if it be a prosecution and the laid [1] fail, let the Bishop use his power and doom severely.'

Another law of Cnut's decreed that if a married man committed adultery with his own maidservant, he was to forfeit her and pay a fine (the amount not specified) for himself to God and to men, whilst a married man who kept a concubine was to be denied by the Church those rites which ought to be administered to Christian men.

Somewhat more merciful were the laws against

[1] The 'laid' was either the trial by iron, water, or corsned —a consecrated wafer which the accused swallowed to prove his innocence.

adultery contained in the code of Theodorus. An unmarried man who committed adultery was punished with five years' penance; if both parties were married, with seven years; for a married man who committed adultery with an unmarried woman, five years; whilst a woman who persuaded the husband of another woman to break his matrimonial vow, was excommunicated, and he was punished by seven years' penance.

According to the ecclesiastical law, a husband could divorce his wife for adultery, and marry again, but a woman could not divorce her husband on the same ground.

If, however, he divorced her for adultery, and married again, provided she were willing 'to do penance for her sins,' she might, after the lapse of two years, enter the matrimonial state once more.

A divorced woman, as we before observed, under Cnut's law forfeited all her property, but by a law of Archbishop Theodorus, a divorced woman, willing to enter the Church, was allowed to retain a fourth of her property.

It will be seen that in the above enactments relating to divorce the civil and ecclesiastical laws were sometimes at variance.

Under the laws of Aethelred, for instance, men were forbidden to marry divorced women, yet by the laws of Theodorus, under certain circumstances, a divorced woman might marry again.

As the Bishop claimed special jurisdiction over matrimonial offences, it is probable that in these instances it was the ecclesiastical rather than the civil law which was followed in these early times.

CHAPTER VI

SUMMARY

IN spite of the praise which Tacitus bestows upon the Germanic tribes for their bravery in war, and their freedom from the vices attendant upon civilization, Britain, like the rest of Europe, suffered severely by the overthrow of the Roman Empire, and subsequent conquest by the Teutonic tribes.

Civilization, which invariably followed in the track of the Roman legions, on their withdrawal vanished for the most part from our island; for the barbarous tribes which overran the country under Hengist and Horsa, putting to the sword the greater part of the inhabitants, were strangers to all arts save a rude method of warfare, in which personal bravery was more conspicuous than either discipline or skill.

Amongst such a people one would not expect to find other than an imperfect system of jurisprudence both civil and criminal, the former scarcely existing, and the latter a rough kind of

justice based upon the principle of 'an eye for an eye,' eventuating in the theory that all crimes could be compounded for at a given price.

Yet considering the barbarity of the Anglo-Saxons, it is surprising that the position of woman was not infinitely lower than appears actually to have been the case. The innate reverence for the sex, to which Tacitus refers, was perhaps one reason for this, while the conversion of the Anglo-Saxons to Christianity, which in principle has always been favourable to the progress of civilization, made also towards this end.

That the Anglo-Saxons had attained to such a degree of civilization as some writers would have us believe, is questionable, neither is it true that the Church alone had the power, even if she always had the inclination, to tame the natural savageness of our Saxon forefathers. All that can be said is, that what little learning there was in the land was engrossed by the clergy, and as knowledge is the chief factor in the progress of civilization, the Church did exercise a power for good upon the bloodthirsty turbulent Saxons, who having conquered the island, spent the greater part of the ensuing five hundred years in slaughtering each other.

Yet, the position of woman, if we judge from the laws in force during this period, was in many respects better than it was after the Conquest. An explanation of this may be, that during these early times, few, if any laws, were made which only affected women, a kind of legislation which, when it did occur, rarely proved favourable to the sex. Thus we find that with regard to her property, she was treated in most respects as a man. There was no Feudal system which either declared her altogether incapable of holding land, or at best allowed her to hold it under many disadvantages. She was allowed to make a will, even if married and during her husband's life, and though it is true she had no part in the government of the country, she was in this respect no worse off than her female descendants who lived in the eighteenth century.

Unless she married, however, her future was like to prove somewhat monotonous; in fact, unless she came of a rich family, or entered the Church, she rarely remained single. This amongst semi-barbarous nations is always the case, and for a very obvious reason. Beyond the duties of governing a household, and rearing a family, little else is left for her to do. What

few trades existed, during this period, were those from which women, through physical inferiority, are excluded. Smiths, carpenters, leather-workers, and such trades connected with war and agriculture, alone flourished—those necessary to luxury begotten of civilization were practically unknown. Domestic servants were supplied from a class called niefs or slaves, as likewise were many agricultural labourers. Marriage, which is optional to a woman in a highly civilized age, is generally a matter of necessity in an age of semi-barbarity.

Glancing at the Saxon criminal laws, one is at first struck with the carefulness of the law-givers to protect women. This protection, however, is perhaps more apparent than real. Even amongst civilized races the criminal law is usually in advance of the morality of the majority of the individuals subject to the laws. Amongst a semi-civilized race this is invariably so. No one, we think, looking at the Saxon laws dealing with offences against women, will be struck with the severity of the punishments attached to them. So long as a man was free-born, he had nothing to fear if he continually set these laws at open defiance, provided he

either had the amount of the fine himself, or some friend who would pay it for him. A rich man was, so to speak, above the law. To commit a rape cost so much, the question whether he should break the law depended chiefly upon the heaviness of his purse.

If then the law considered such offences adequately punished by a fine, it is not unnatural that the majority of the people did not look upon them as offences at all, and this, together with the fact that no system of police worthy of the name existed, shows that the protection which the law afforded to women was by no means so effectual as the laws themselves would lead us to believe.

With regard to the punishments inflicted upon women for offences which they committed, the Saxon lawgivers seem to have gone out of their way to be severe, and this is the more remarkable because as a rule the Saxon laws are not exceptional for the severity of their punishments.

A free man might steal, and be only fined for his offence. A free woman, for the same offence, was either drowned or cast down from some high place and dashed to pieces upon the rocks below. Though the condemning to death

for theft of both male and female slaves was of but little moment to a Saxon lord, yet he went out of his way if the culprit were a woman, to prepare a particularly horrible death for the unfortunate thief. This was burning to death, the executioners being the prisoner's fellow female slaves, a piece of savage cruelty, which, unless it rested upon uncontestable evidence, one would scarcely have given credence to.

The criminal law given by the ecclesiastical authorities, though it subjected women to many petty annoyances, cannot be called vindictive. On paper, it is true, it had the power of inflicting punishments for a large number of shortcomings, which in these days the law does not take upon itself to correct. Though these laws were no doubt often put into execution 'for the good of the soul' of the offender, they were perhaps as often used with a view to the ultimate filling of the coffers of the Church. Penance, the chief punishment inflicted by the Church, was, after all, only the pecuniary mulct dressed up in an ecclesiastical garb. To inflict penance upon a rich woman was, in nine cases out of ten, a sure means of bringing grist to the ecclesiastical mill, and that this was partially the intention of both Theodorus and Ecgbertus,

may be gathered from the fact that these worthy Archbishops drew up a list of pecuniary equivalents to the fastings, prayers, and genuflections which they imposed for laxity of morals. It is not improbable therefore that many a poor woman on account of her poverty escaped punishment at the hands of the ecclesiastical tribunals, if it chanced that the Bishop were in want of funds for religious or secular purposes, and so was busy punishing the Magdalenes who were rich in this world's goods.

That the clergy were not above actions such as these, every reader conversant with the history of the Church during this period will be aware, for the morality of many priests was such, that the least worthy character in the whole parish was frequently the priest himself.

One of the best proofs of the semi-barbarity of the Anglo-Saxons is to be found in the marriage customs prevalent in the early part of this period. In the first Anglo-Saxon law touching marriage, a man could buy a maiden with cattle, nor is there any evidence to show that the bride's consent was necessary to the transaction. Women seem to have been in a worse state than the maidens of the Abipones and other savage tribes of the present day.

Amongst these tribes the bridegroom bargains with the bride's parents as to the price of their daughter, but we are told it frequently happens that the girl rescinds what has been agreed upon between the parents and the bridegroom, obstinately rejecting the very mention of marriage; whilst if the parents make a match contrary to the daughter's will, she refuses, and is never compelled to comply.

Before the close of the period under observation, marriage, however, was looked upon, by the lawgivers at least, as something other than a mere bargain between the bride's parents and the bridegroom. The bride now had a voice in the matter, for her consent was a condition precedent to the alliance. Nor was the transaction of such a simple nature as in former times, pledges being given by the bridegroom for fair behaviour towards his spouse, the best man becoming a guarantee for the bridegroom. Moreover the services of religion were called in, in order to impress the parties with the solemnity of the proceedings, and though at the beginning these were only of an administerial nature, the foundations of the ecclesiastical power over matrimony and things matrimonial, which grew to be absolute in the following

period, were undoubtedly laid at this early stage.

The Saxon married woman, according to the later laws dealing with marriage, was treated with consideration. Her parents, previous to her marriage, were satisfied by their future son-in-law as to his ability to provide for their daughter. The morgen-gifu alone is proof that a married woman was capable of holding property in her own right, being equivalent to a settlement of so much upon the wife for her own separate use. He guaranteed to treat his wife with kindness, and if he took her any distance from her father's roof, he especially agreed not to harm her. So reasonable and equitable are the laws of King Edmund as to marriage, that during the interval between Aethelbirght's first marriage law and the above, one is bound to admit that the Saxons undoubtedly made a step in the direction of civilization.

The law of separation and divorce is such as one might have expected to find, when the State was relinquishing, and the Church about to take over, the sole jurisdiction in matrimonial matters. Adultery, it is true, is mentioned in the Saxon Dooms, but it is treated rather as a

crime than a matrimonial offence; while separation and nullity were left entirely to the ecclesiastics.

From the ecclesiastical laws of Theodorus it would appear that at this time the Church either did not regard marriage as a sacrament, or was more lax in the application of the doctrine than in later times. Hereafter we shall find that no matrimonial offence committed after the marriage could be a ground of divorce. Yet, during this period, adultery committed by the woman subsequently to the marriage was a cause of divorce, and the husband was allowed to marry again, as might also the wife, under certain circumstances already referred to.

Taken as a whole, then, it may be said that the Saxon laws treated women not unfairly, protecting them more fully than one might have supposed. Yet, considering the character of the Saxon people, their lawlessness, their innate savageness, and their objection to any form of government save that of the sword, it is probable that both men and women held these laws in no little contempt. This, coupled with the fact that more often than not war was in progress, with its attendant suppression of all

law for the time being, makes it questionable whether any code of law, no matter how excellent, would have had much effect upon such a people. Yet in spite of the inability of the Saxon lawgivers to grasp the fact that a crime is not an offence against the individual, but against every member of society, had the morality, and we may add humanity, of the Saxon people been in proportion to that appearing in the Saxon Dooms, the civilization of to-day would be of a very much higher order than it really is.

PART II

A.D. 1066—1534

CHAPTER I

POSITION OF WOMAN AS A CITIZEN

Three sources from which the English law during this period is derived—1. The civil and canon law—2. The common law—3. The statute law—Woman's position as a citizen—Her right of being a plaintiff in a civil action—Could be sued in the courts—Could be a witness, but if married incapable of giving evidence against her husband—Could make a will if unmarried—Her right to bring an appeal in certain criminal cases—Trial by battle—Was exempted from trial by battle—Her right to carry on a trade—The importance of this right—The Statute of Labourers—Sumptuary laws affecting women.

DURING the period with which we are about to deal, and which ranges from the accession of William the Conqueror down to the year 1534, the laws of England are divisible into three separate parts, viz. the civil and canon law, the common law, and the statute law. Without going into an exhaustive explanation of the above, it is necessary to give the reader a brief account of what these three divisions were composed.

The canon law, for the most part, consisted of a body of Roman ecclesiastical laws relating to certain matters over which the Church had special jurisdiction, such as marriage, divorce, wills, etc. And this jurisdiction lasted in some matters for a longer, and in others for a shorter period.

The civil law, or in other words, the Roman law, appears never to have affected the English law directly, but many of its doctrines appear in the ecclesiastical law, which at this time was part of our system of jurisprudence.

As to the common law, save where it has been expressly overridden by Acts of Parliament, it is the law of the land to this day. In contradistinction to the statute law, or law made by Acts of Parliament, it is known as the unwritten law, and consists of a collection of customs which have existed 'time out of mind.' What the particular origin of these customs is, whether they be of Saxon or Norman parentage, and when they first appeared, it would in most cases be impossible to say. Nor is it true to say that the common law is never added to, for we have numerous decisions of Judges upon points of law, which from time to time have cropped up, and which decisions have been

followed, and thus become incorporated with the common law of England.

Statute law is composed of the several Acts passed by the two Houses of Parliament, and receiving the assent of the reigning monarch.

Such were the sources of law during the period which we are about to enter, a period which perhaps dealt less favourably with woman than any which English history has recorded.

As might be expected, the position of woman as a citizen was not very exactly defined. She was taxed, but had no voice in the government of the country; the government of her household being considered then, and for many centuries afterwards, a sufficient scope for her administrative powers. Provided she were over age, she was capable of bringing an action in her own name for civil wrong done to her; though if married, as we shall see hereafter, she could only sue in the name of her husband. She was a competent witness in the courts of law, unless the case were a criminal one, and could give evidence for or against her husband. She could make a will if a single woman. She could in early times, when appeals, which were criminal proceedings brought by individuals, were in use,

bring an appeal for the murder of her husband; and also, it would appear by the *Mirrour*, an old law book written in Edward I.'s reign, that if a single woman, and above age, she might bring an appeal against any one maliciously burning her property or stealing it. Under certain circumstances the law specially favoured her. In all appeals which were allowed in cases of murder, larceny, rape, arson, and wounding, the truth of the accusation might be proved by battle, a mode of trial which existed down to the reign of George III.,[1] though no actual trial by battle took place later than the seventeenth century.

The usual method of conducting a trial by battle was after the following manner. The prisoner when charged with the felony pleaded not guilty, and throwing down his glove declared he would defend the same with his body. The prosecutor, by way of accepting the challenge, took up the glove, and replied that he was ready to make good his appeal, body for body.

[1] So late as the year 1818 an appeal for murder was brought by the brother of the murdered person, and the party accused of the crime, although he had been acquitted by a jury, demanded a trial by battle. Nothing further, however, was done in the matter, the appellant dropping the proceedings.—Ashford *v.* Thornton (*Barn. and Ald.* 405).

The prisoner then took up the Bible in his right hand, and in his left the right hand of his antagonist, and said, 'Hear this, O man, whom I hold by the hand, who callest thyself John by the name of baptism, that I who call myself Thomas by the name of baptism, did not feloniously murder thy father William by name, nor am anywise guilty of the same felony, so help me God and the Saints, and this I will defend against thee by my body, as this court shall award.'

To this the appellant or prosecutor replied, holding the Bible and the prisoner's hand in the same manner, telling him that he was perjured and that he did commit murder, and offering to prove it by his body.

The next step was to arm the parties, the heads, necks, and hands being left uncovered, the backs, thighs, legs, and feet armed with iron, whilst each was armed with a shield and a lance. On the combatants entering the lists, they took an oath that they had not upon their persons 'stones, bones, grass, or any enchantment,' and the battle began.

If the prisoner killed the prosecutor, or defended himself until the evening, he was acquitted, as was also the case if the prosecutor

surrendered. If the prisoner were killed, Providence was supposed to have determined against him, and if he surrendered and said the word 'cravent,' he was adjudged guilty, and was hanged immediately.

Now if the prosecutor or appellant happened to be a woman, the person accused of the crime could not demand a trial by battle, it being obvious that he, being a man, and his adversary a woman, the combat must necessarily be of an unfair nature.

Accordingly he was, under these circumstances, bound to submit to be tried by a jury. Neither could battle be joined if the party accused were a woman, for similar reasons, nor could a combat be fought between two women, but in all such cases the accused was allowed to prove her innocence by the ordeal of fire or water.

Equally with a man, a woman was allowed to carry on a trade or calling, so far as can be ascertained, all *trades* being open to women. That she was allowed to carry on the business of a brewer, we gather from an Act of Parliament passed in the reign of Edward II., for it is expressly declared in this Act, known as the Assize of Bread and Ale, that 'if the woman

brewer' adulterates the ale or sells short measure, she shall be punished by the tumbrel, trebuchet, or castigatorie.[1] By another Act passed in Edward IV.'s reign, it is recited that the silk-women of London had complained that 'Lombards and other alien strangers were daily bringing into the realm wrought-silk (silk garments already made up), and no unwrought-silk,' thereby causing the final destruction of the silk-women's mysteries and occupations, and steps were taken to prevent this for the future.

At first sight, this right of trading may seem but a very little matter, but in reality, as we hope to show later, it has proved no inconsiderable factor in what is popularly termed 'the woman question,' being one of the chief means of placing her in a position to successfully draw attention to what she considers the wrongs of her sex.

A statute which affected women belonging to the poorer classes, was the Statute of Labourers passed in the reign of Edward III.[2] By this

[1] The trebuchet or castigatorie were other names for the cucking-stool, whilst the punishment of the tumbrel was to stand knee-deep in the dung-cart.

[2] 1349.

Act, every woman free or bound, under sixty, and not carrying on a trade or calling, provided she had no land, and were not in domestic or other service, was liable to be called upon to enter service either in the fields or otherwise, and if she refused, she was imprisoned until she complied; whilst all girls who for twelve years had been brought up to follow the plough, were not allowed to enter any other calling, but were forced to continue working in the fields.

Although sumptuary[1] laws applied to men as well as to women, it was probably the latter who felt their rigour the more. The forbidding of a man to wear fur upon his cloak, or garments composed of certain stuffs, meddlesome as such legislation undoubtedly was, was probably borne with more equanimity than the wholesale invasion of the female wardrobe and the denial of finery to which the mediæval ladies were from time to time exposed.

It must be remembered, however, that in those days grades of society were more numerous, and more strictly separated from each other

[1] Strictly speaking, sumptuary laws may be said to fall under the head of criminal legislation; we have, however, placed them here as affecting woman as a citizen.

than now, dress being one of the great distinctions of these grades, and so perhaps it was chiefly for this reason, coupled with the idea that the poorer classes might ruin themselves by dressing beyond their means, that the sumptuary law was introduced into England.

The first of these laws was passed in the reign of Edward III. (1336). By it no woman of England, Ireland, Wales, or Scotland, with the exception of the Queen and her children, wives and daughters of earls, barons, and knights, were allowed to wear fur on their clothes, upon forfeiture of the fur and punishment at the King's will.

Another Act passed in the same king's reign contained a still more rigorous enactment. Wives and daughters of ploughmen were allowed to wear only blanket and russet ware of twelve pence the yard, and girdles of linen only; while those belonging to the class of servants were restricted to cloth which did not exceed the price of two marks the piece. They could wear nothing of gold, silver, embroidery, nor of silk, and no veils nor handkerchiefs costing more than twelve pence each.

To wives of handicraftsmen and yeomen the cloth was limited to forty shillings; they were

not allowed to wear pearls nor cloth of silk, nor gold nor silver girdles, rings, garters, brooches, ribbands, nor chains. Gold or silver embroidery was likewise tabooed, as were silk and silk veils, yarn veils made in the country being deemed good enough, whilst the only fur which they were allowed to wear was that of the rabbit, fox, and domestic cat.

Those of esquires and gentlemen under the estate of a knight, not having land to the value of one hundred pounds a year, might pay four marks and a half for their cloth; but they could not wear cloth of gold, silk, silver, nor embroidered cloth, nor gold ornaments, nor fur.

Those of esquires having two hundred pounds a year could pay five marks for their cloth, and could wear cloth of silk, silver ribband, and other apparel reasonably furnished with silver. Fur too turned up of miniver, without ermine or letuse,[1] was likewise allowed them, as well as pearl ornaments, but only in their head-dresses.

Those of knights with a land-roll of two hundred pounds could pay as much as six

[1] Miniver was ermine prepared in a special manner; letuse, a fur resembling ermine, but of what animal it is not known.

marks for their cloth, but could not wear cloth of gold, ermine and letuse being also denied them. Pearls, as in the former case, when confined to their head-dresses, were allowable.

The punishment for breaking this law was the confiscation of the offending garments.

Yet another Act of Parliament concerning clothes was passed in Edward IV.'s reign. By this the wives of knights under the estate of a lord were not permitted to wear cloth of gold, or corses wrought with gold, or fur or sables; and though the statute says nothing as to the forfeiture of the offending garments, it expressly declares, that if a wife put on any of these forbidden clothes or ornaments, the husband was to suffer by a fine.

The wives of knights bachelor were debarred from wearing cloth of velvet upon velvet; those of esquires and gentlemen were not to put on velvet, satin, nor a counterfeit cloth of silk resembling the same, nor any corses wrought like velvet, nor satin, nor any fur of ermine, the husbands who allowed their wives to transgress this law being fined ten marks.

All those who had less than forty shillings per annum were not allowed to dress in fustian,

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bustian, or scarlet cloth, nor use any fur but that of black and white lambs, whilst wives of servants, husbandmen, and labourers could only wear dresses made of cloth which did not cost more than two shillings a yard.

So much money was laid out by ladies upon kerchiefs, that a special clause in the Act, after reciting 'that because kerchiefs daily brought into the realm do induce great change, and costs in the same and in effect in waste,' declares that no shopman shall sell any of lawn, niefles, or simple, whereof the plite was more than ten shillings.

In the year 1509 another sumptuary law was passed, though from this Act women seem to have been especially exempted, whilst an Act passed six years later repeals all former Acts upon the subject.

In this, women were included, but as the provisions are in most points similar to the Act passed in Edward IV.'s reign, which we have already given, we shall not tire the reader with any extracts from this copious Act of Parliament.

CHAPTER II

POSITION OF WOMAN IN RELATION TO PROPERTY

A short account of the feudal system—The system unfavourable to woman—Tenure by knight-service—The lord's right of wardship over infant female tenants—His right of marriage—Originally these rights not unreasonable—Other tenures—Freehold—Wardship and marriage in this tenure more beneficial to woman—Borough-English—Gavelkind—Copyhold—The present law of descent still governed by the old law—Estates less than freehold—Leaseholds—Estates for life—Estate in dower—How women were endowed—Jointure in place of dower—History of dower during the period—Endowment 'at church door' similar to old Saxon custom—Probability of it being of Saxon origin—Personal property—Women in a much better position with regard to personal property—Could succeed thereto equally with men.

ALTHOUGH a system, resembling in many respects the feudal system, existed amongst the Anglo-Saxons, it was not until the latter half of the reign of William the Conqueror that the feudal polity was in its entirety adopted in most parts of the country.

As the chief methods of holding land under

this system affected women in no small degree, and even affects them to this day, we purpose giving a short account of the system as well as the leading features of the several tenures created thereby.

The theory of the feudal system was as follows—The king or leader of a tribe having subjugated some tract of land, as a reward to his followers divided the land amongst them, keeping, of course, a large portion for his own particular use.

In the earliest times property thus acquired was given to the tenant for a lifetime at longest, and for this the tenant or vassal, as he was called, was expected to render to his lord or master certain services, usually of a military nature, such as attending him armed on his warlike expeditions, as well as swearing to be faithful to him so long as he continued his tenant. On the other hand, the lord agreed to protect his tenant from all harm.

Considering the insecurity of life and the general violence of those times, this protection extended by a powerful lord to a vassal was no small advantage, and although he was bound to fight in his lord's quarrels, he certainly gained under the circumstances more than he lost, for it

availed him but little to be absolute owner of his land, if at any moment a man more powerful than himself could drive him from his possessions, and occupy them in his stead.

Yet the very nature of this agreement between lord and vassal was one which was fatal to women holding land, for though the contract upon the lord's side might be carried out with a female tenant, she was by necessity unable to fulfil her part by attending the lord in his wars, and so it was for this reason that in early times, when feuds were 'strictly proper,' women were shut out entirely from holding lands under this system.

As time went on the interest of the tenant gradually improved in stability, and acquired an hereditary character, so that on the death of a tenant his lands descended originally to all his sons in equal proportions, but eventually to the eldest son in exclusion of all the rest.

In tenure by knight-service (the general tenure throughout the country during the early part of this period), the land on the death of the tenant passed by descent to his heir; the sons, however, succeeding before the daughters.[1]

[1] By the law of descent, if there be no male issue, the daughters, if there be more than one, succeed together and inherit the estate as coparceners.

In the event of the heir being a female, and under the age of fourteen, the lord was entitled to the wardship.

This consisted in his having the custody of both her lands and person until she arrived at the age of fourteen, or married, and during that time taking all the profits of the land.

The reason for this was that up to the age of fourteen the lord lost the service of his vassal, for there was no one to perform it; but at the age of fourteen she was old enough to govern a household and marry a husband, who would be able to attend the lord on his wars.

Not only was she liable to remain in the lord's custody until she arrived at the age of fourteen, but, if she still remained unmarried at that age, the lord could keep her lands in custody for yet another two years, taking the profits during all that period.

But the lord had yet another right, viz. that of marriage, or the disposing of his infant tenant in matrimony. On her arriving at the age of fourteen he might introduce to her some suitable person, who he thought would make her a good husband. If she refused to marry him, the penalty for her disobedience was, that the lord could hold her lands until she arrived

at the age of twenty-one, and without accounting for the profits of the land, whilst even if he did not find a husband for her, on her coming of age,[1] he was entitled to the value which he might have obtained for giving his consent to her marriage.

This was a piece of injustice not of strictly feudal origin, but a custom imported from Normandy. It is presumed that the Norman Barons, when they gave their consent to the marriage of a female ward, received a sum of money for so doing, and that this, with the other Norman doctrines of feuds, was introduced into England.

On consideration it will be seen that originally the lord's rights of wardship and marriage over his infant female tenant were not unreasonable. He took the profits of her lands during his guardianship as a set-off to his loss of service, whilst his right of controlling her marriage was plausible at least in that otherwise there was nothing to prevent her from marrying one of his enemies.

Although the greater part of the land was held by the above tenure, still others existed. Women who held their lands by Free Socage, or

[1] Sixteen in this case.

freehold, were in every way in a better condition. Here there was no personal service, the tenant paying a certain fixed sum, or doing a certain fixed act, such as ploughing the lord's land for three days, or simply swearing faith to him. The law of inheritance, it is true, was the same as in knight-service, but the wardship was of a totally different nature. In the first place it never belonged to the lord, and as there was no personal service to be performed, there was never occasion for the lord to take the profits in order to provide a substitute. The custody of the infant female tenant until the age of fourteen was given to her nearest relation, not being one to whom the inheritance could descend, and on her attaining that age the guardian was bound to account for all the profits of the land.

'Marriage' too was of a different nature in freehold. If the guardian caused his ward to marry under the age of fourteen, he was bound to account for the value of the 'marriage,' even though he took nothing for it, lest by some collusion the guardian should have received the value and have applied it to his own use.

Of tenures current in England during this period, whereby women were especially af-

fected, we may mention Borough-English, wherein the lands descended to the youngest son in exclusion of all the others, the females never inheriting. According to some writers the origin of this tenure was that the lord of the fee had anciently a right of concubinage with the tenant's wife on her wedding-day, and that therefore the tenement descended not to the eldest, but to the youngest son, who was more certainly the offspring of the tenant, though it is questionable if this be the real origin of the custom as it existed in England.

Gavelkind, an old Saxon tenure, common at one time to all Kent, was where the inheritance descended to all the sons equally in exclusion of the daughters, females being incapable of inheriting under this tenure.

Copyhold lands, to which in most cases the females could inherit, though occasionally the method in Gavelkind and Borough-English governed the descent.

The above are the chief tenures which particularly affected women after the Norman Conquest, and all these, with a few slight restrictions imposed from time to time, continued down to the reign of Charles II.

Even to this day their effect is felt, for the

rule of descent in freehold lands is still governed by the old law. At the present time, however, there is no reason of any weight why a younger son should inherit before his elder sister, yet such the law remains. In early times, as we have seen, there was an adequate reason for this, for the lord granted the land originally on condition of personal military service. For many centuries, however, this reason has vanished, and although the difficulty can now be avoided by the making of a will which will give the inheritance to the daughter in exclusion of the son, it cannot be denied that in this instance the law indirectly favours men and imposes a penalty upon women.

As to estates less than freehold, such as estates for years, or what we now term leaseholds, women were allowed to hold them without any restrictions, as in the same way they were capable of holding freehold estates, not of inheritance such as for the term of their natural lives or during widowhood.

Amongst these latter estates one affecting married women was the estate in dower. This arose from the right which every widow had to a third part in value of her late husband's

lands and tenements,[1] which estate lasted for the space of her natural life. It was necessary for her to be the actual wife of him under whom she claimed dower at the time of his death, and so if the marriage had for any reason been declared void, she was unable to claim this estate. Mere separation from her husband, even for adultery, did not destroy her right to dower, but by a statute passed in Edward I.'s reign, a woman who eloped from her husband and lived with the adulterer, lost her right to dower, unless the husband were voluntarily reconciled to her, whilst she likewise lost it in the event of her husband being convicted of treason.

The way in which a woman was endowed in early times was as follows—Her husband (the tenant of the land) on the marriage day endowed her at the church door,[2] with whichsoever of his lands he specially named, a proceeding not unlike that which we saw took place amongst the Anglo-Saxons, at the be-

[1] Dower only attached to lands and tenements of which her husband was seised in fee simple or fee tail, in other words freehold lands, and not to these if he held them by a conveyance to uses to bar dower.

[2] Three other methods existed besides this, dower at the church door, however, being the most common during this period.

trothal of a maiden, when the bridegroom 'promises how much he will give her if she survive him.'

But apart from this special act of endowing, the common law gave to every widow the right of dower, even though the husband never endowed her 'at the church door.'

By the old law a woman could not be endowed without a sum of money being paid to the lord, nor was she allowed to marry again without his licence, and this, in many instances, the lords refused to give, unless they were well paid for so doing, though they often forced the widow to a second marriage, simply for the purpose of being paid the fine. This, however, was remedied by Magna Charta, wherein it is stated that the widow shall not be constrained to marry afresh, if she choose to live without a husband.

Provided the wife were jointured, she was unable to claim this right of dower. A jointure was an estate of freehold lands which on the death of the husband passed to the wife, for her life at least, and if certain formalities were observed, this jointure had the effect of barring her right to dower.

The doctrine of dower in early times was

continually changing. At first the wife's claim extended to a half of her husband's lands, but this was forfeited by incontinency, or a second marriage. In Henry I.'s reign this condition of widowhood and chastity was only required in case there was a child of the marriage, whilst still later this condition was swept away.

Endowment 'at the church door' might endow the wife with less than a third of the husband's lands, but could not possibly give her more, the common law never giving her more than a third. Before Henry IV.'s reign, if the husband had no lands, he could endow her at the church door with goods, chattels, and money, nor could she claim dower in his after acquired property; but in that reign this was denied to be law.

In conclusion, we may point out that when endowing a wife 'at the church door,' or in other words, at the time of marriage, the husband actually made use of the phrase which appears in the marriage service of to-day, viz. 'with all my worldly goods I thee endow.' That this is the origin of the phrase as set out in our marriage service there can be no doubt; and as we have seen that words not unlike the above were used in the old Anglo-

Saxon law of betrothing a maiden, it may give some authority to the suggestion that dower had an earlier origin than that which is generally assigned to it.

With regard to personal property women were certainly in a much better position. If unmarried, they could acquire it and hold it in the same way as men, as well as dispose of it by will to whomsoever they thought fit.

In the reign of Henry II. it is said that a man's goods were divisible into three parts, one of which by law passed to his children or lineal descendants, another to his wife, a third only being at his own disposal by will. Unlike real property, however, in which the brother took the inheritance before the sister, and the elder brother before the younger, in personal property all this part was equally divided between brothers and sisters.

During this period it would seem that these two-third parts, viz. one to the wife and one to the children, passed by law, a testator being unable to leave his goods in any other way, whilst even if he died without making a will, the children and wife still obtained their respective shares.

CHAPTER III

CRIMINAL LAWS AFFECTING WOMAN

Saxon laws still in use at the beginning of this period—Gradual disappearance of the pecuniary mulct as a punishment for crimes—Offences against the person—Homicide—Petit treason—Its punishment—Murder of a child under the age of one year—Abortion—Abduction—Rape—Offences against religion, morals, and public convenience at common law—Witchcraft—Brothel-keeping—Laws of Henry II. as to licensed stews—Offence of being a common scold—Its punishment—Offences against morals under the ecclesiastical law—A short account of the ecclesiastical law courts and their mode of procedure—Reports of cases coming before these courts—Incontinence—Overlaying infants—Non-attendance at church—Keeping child unbaptized—Putting up the banns of marriage and not marrying—Witchcraft and sorcery—Blackmail — Defamation of character — Threatening a mistress—Procuring women for gain—Coming to church dressed as a man—Ecclesiastical punishments—Excommunication, two kinds, the greater and the less—Penance no longer fasting, but an act of public humiliation—Points in the criminal law affecting women—The law of accessory in respect to married women—Benefit of clergy denied to women—Punishments of women—The inhumanity of the period particularly noticeable in the punishments awarded to female criminals.

THROUGHOUT the early part of this period much of the criminal law contained

in the Dooms of the Saxon kings still remained the law of the land, and if we look at the laws of William I. and Henry I., we shall find numerous enactments relating to crimes which appear to have been taken bodily from many of the old Saxon Dooms.

Still the criminal laws of these two periods, though blending with each other where they join, as is only natural, are at the two ends absolutely dissimilar. We find the Saxon punishment of pecuniary fine gradually dropping out, and punishments of a much severer nature introduced, satisfaction to the individual being thought of less moment than satisfaction to the State. The chief reason for this was the growth of towns, this having a social effect upon men, and they began to look upon crime not so much as a wrong done to the individual as an offence against society.

Homicide.—Under the head of homicide we find only one instance in which women were punished in a different manner to and with more severity than men, viz. when they were guilty of *petit treason.*

This offence, though mentioned in an Act of Parliament passed in Edward III.'s reign, was probably part of the common law, and was

a special offence before the passing of the statute.

The usual punishment for the crime of murder was death by hanging (the culprit being allowed the benefit of clergy, of which, however, we shall speak hereafter), but if a woman murdered her husband, she was adjudged guilty of *petit treason*, and a special punishment inflicted.

It was thought that between every wife and husband relations existed similar to those between the subject and the King. She owed to him faith and obedience, and the violation of this faith was looked upon as a species of treason.

During these times in all treasons committed by men the punishment was that of being hanged, drawn, and quartered. The law, however, appears to have had some scruples as to whether it was decent to publicly expose and mangle the naked body of a woman, and so, in place of this, ordered her to be drawn on a hurdle to the gallows and there publicly burnt.

Such was the punishment for high treason, and such was the punishment meted out to the wife who killed her husband, and was found guilty of *petit treason*. Sir Matthew Hale seems to be of opinion that, in early times, a woman

was guilty of this offence if with the intention of killing her husband she beat him so that she left him for dead, but that eventually he recovered; the murderous assault itself being sufficient evidence of a treasonable disposition.

If it happened that the husband killed the wife; this was only murder, not *petit treason*, for the law held that the husband did not owe the wife obedience, she being in subjection to him.

Abortion.—If by any chance a woman killed her child, while it was under the age of one year, the common law took no notice of the crime, it being deemed an ecclesiastical offence only, which, together with the offence of procuring abortion, the Church took cognizance of and punished by penance.

Abduction.—As to abduction we find a special statute passed in Edward II.'s reign, which declared that if any man take away a woman from the custody of the lord who had the right of marriage, if he married her, he was bound to abjure the realm, or in other words, leave the country; but if he restored her to the lord, and paid the value of the marriage, two years' imprisonment was deemed a sufficient punishment.

In Henry VII.'s reign the forcibly carrying

off of any woman, having substance in goods or lands, being followed by her marriage and defilement, was punishable by death, it being a very common practice at that time for the Barons to seize upon unprotected women and widows, who were gifted with this world's goods, and force them by threats of imprisonment or violence into a marriage.

Rape. — The punishment for this offence, which under the majority of the Saxon Dooms was a fine only, was changed in William I.'s reign to burning with a red-hot iron over the eyes, and mutilation.

It was necessary, in order to obtain a conviction, for the woman to proceed immediately after the assault to the next town, and there make discovery to some credible person of the injury which she had suffered, as well as to acquaint the high constable of the hundred, the coroner and the sheriff.

Up to Richard II.'s reign, and probably later, the injured woman could, provided the judge and her parents consented, redeem the offender from the execution of this sentence by accepting him for her husband. Yet so careful was the law of the liberty of the individual, that unless the offender himself was agreeable to the

proposed match, he could not in any way be forced into the marriage.

By another Act, passed in Richard II.'s reign, however, consent after rape made both the parties unable to take by inheritance. If the woman were married she lost the right to her dower, and in spite of the consent, the husband and next of kin might sue the ravisher and have him convicted and executed.

An alteration in the law as to rape occurred in Edward I.'s reign. By this Act the punishment of rape was greatly mitigated, the offence of ravishing a damsel within age (*i. e.* under twelve years), either with or without her consent, or of any other woman against her will, was reduced to a trespass, unless prosecuted by appeal within forty days, the offender being liable to two years' imprisonment only, and a fine at the King's will.

This lenity of the law, however, was found to be productive of so many evils, that a few years later, in the same reign, the offence was made punishable by death.

Offences against religion, morals, and public convenience.

Witchcraft.—Although the majority of these offences came under the jurisdiction of the ecclesiastical courts, the municipal laws took cognizance of a few. Witchcraft, for instance, was still an offence at common law, and many a woman suffered death through the ordeal by water, whereby the unfortunate person accused of the crime was bound hand and foot, and thrown into a river or pond. If she sank, it is true, she was acquitted, but it is probable that this proof of innocence, in many cases, was obtained at the price of the suspected person's life.

No Acts of Parliament, however, dealing with this offence grace the statute book during this period, it being left to the legislators of a later age to make witchcraft and sorcery an offence worthy of death by statute.

Common nuisances.—By an Act of Parliament passed in 1161, disorderly houses, or as they were called in those days stews, were duly licensed by the Crown, and as commercial undertakings farmed out to the highest bidders.

The chief provisions of the Act regulating these places were as follows:—

That no stewholder or his wife should let or stay any single woman to go and come freely at all times when they listed.

No stewholder to keep any woman to board; nor to take more for the woman's chamber in the week than fourteen pence. Nor to keep open his doors upon holy days, nor to keep any single woman in his house on the holy days.

No single woman to be kept against her will that would leave her sin.

No holder to receive any woman of religion or any man's wife.

No man to be drawn or enticed in, and no holder to sell bread, ale, flesh, or any provisions.

Not a little curious is an offence which most of the old legal writers mention, viz. that of being *communis rixatrix*, or a common scold. This offence is confined to the feminine gender, a man apparently being incapable of committing it.

A woman thus found guilty was seized by two strong men and placed upon the cucking- or ducking-stool. This instrument of correction, though varying in construction in different parts of the country, was in principle a chair, which

by mechanical means could be let down into a pond or river and drawn up again, the unfortunate common scold being tied in the said chair during the operation.

Offences against morals, etc., falling under the ecclesiastical law.

By far the larger class of offences against morals, however, came under the supervision of the Archdeacon, the Church during these times being considered the proper authority to correct the laymen as well as the clergy, guilty of perjury, defamation of character, witchcraft, breach of faith, incontinence, and other shortcomings of a like nature.

Yet the ecclesiastical authorities appear to have had no code to guide them, there being no schedule of offences, the committing of which might bring punishment upon the offender, but any act which savoured of moral delinquency was triable and punishable, and these offences ranged from incest down to the composing of indecent rhymes, and failure to attend divine service in the parish church.

Chaucer in his Frere's Tale gives us a very fair sample of the offences which the Arch-

deacon was in the habit of punishing, in the following lines—

> 'Whilom there was dwelling in my countré
> An erchedeken, a man of gret degré
> That boldely did execucioun
> In punyschyng of fornicacioun,
> Of wicchecraft and eek of bauderye,
> Of diffamacioun and avoutrie,
> Of churche-reves, and of testamentes,
> Of contractes, and of lak of sacraments.
> And eek of many another maner cryme
> Which needeth not to reherse at this tyme:
> Of usur and of symony also,
> But certes lecchours did he grettest woo.'

The most usual mode of procedure in these courts was by way of inquisition. Every judge had attached to him several apparatiors or sumpnours, who were nothing more than paid informers, whose business it was to hunt out the moral misdeeds of the people, and summon them before the court.

Even supposing that this system of moral police had been free from any suspicion of bribery and blackmail, a more hateful system could not well be conceived. But in many cases it was shamefully abused, and the Frere's Tale in *Chaucer* is in all probability not a burlesque of the informer's methods, but absolute history.

Supposing then that one of these informers happened to find that a woman had committed some act which the Archdeacon considered against the moral law. The first step was to cite her, and on a certain day she came before the court. The judge then tendered her what was known as the *ex-officio* oath, by virtue of which she was bound to answer truly all questions put to her. No counsel was allowed her, she being bound to defend herself in person.

After being sworn, the judge informed her of the nature of the offence, and asked her if she were guilty. If she denied the accusation, the case was usually adjourned, in order that she might produce three or five compurgators, or neighbours, who were willing to swear that they believed her innocent.

Provided that she was able to produce these neighbours, and they swore to her innocence, she was dismissed; but if she failed to bring them, or they refused the oath, she was condemned, the punishment usually being the performance of some penance, of which we will treat hereafter.

If she took no notice of the summons to appear, the judge usually suspended her from

the Church, and this suspension might, upon further contempt, grow into excommunication, a punishment which in those days had objectionable consequences.

Archdeacon Hale, in his *Precedents and Proceedings in Criminal Causes in the Ecclesiastical Courts*, commencing from the year 1457, gives some rather curious cases which throw not a little light upon the offences over which the court had jurisdiction.

Thus we find Agnes Berry was charged with incontinence with a certain Richard Nuttyng. The man only appeared and denied the accusation, and the case was adjourned for him to produce compurgators. Upon producing them in court, they refused to take the oath, and the matter was again adjourned to another day, upon which, the man not appearing, he was suspended from the Church.

Margaret Heywood, 'a common courtesan,' was summoned 'for that priests and laymen of questionable repute and conduct were continually in her company.' This accusation she denied, and called upon Katherine Russell, Eliza Hunte, and Emily Bun as witnesses to her irreproachable character, and on paying expenses was dismissed.

Katherine Cristchurch was charged with being guilty of incontinence with Robert Bentley, and for having remained in the custody of the said Robert for two years, without going through a form of marriage. She confessed the truth of the charge, and for the purpose of avoiding doing public penance they paid the sum of six and eightpence.

In cases of incontinence sometimes the court dismissed the parties, if they promised to be joined together in matrimony. Thus Henry Holden and Eliza ——, who were cited for this offence, were dismissed on promising to become man and wife.

Margaret Saunders was cited for procuring abortion; Jane Foster for overlaying two infants, one belonging to John Paris; and Joan Bobet for not hearing service in the parish church.

Jane, the wife of John Minors, was accused of keeping her child unbaptized for a whole month, which offence she seems to have greatly aggravated by feasting at a tavern when she came to be churched, and when remonstrated with, replying, 'That it was only a ceremony.'

To put up the banns of marriage, and then not to marry, was considered by the ecclesiastical courts as perjury; and a certain Chris-

topher Kechyn, whom the framer of the article described as 'a noted common deceiver and violator of maidens, a common adulterer and violator of the sacrament of matrimony,' was accused of thus putting up the banns with many girls, Alice Dystac and Margaret Brock being amongst the number, seducing them, but not going through the form of marriage.

In the same way a woman, who contracted marriages with several men, and did not marry, was also liable to punishment; and even a refusal to marry, on the part of a woman, if there were a contract, as in the case of Alice Webster, who denied the contract of matrimony with Edward Swerd, was a matter for the court's intervention; and it had the power to grant an injunction compelling the celebration of the marriage.

Of witchcraft and sorcery there are many cases. Joan Bennet, *alias* Warde, had amongst others the unenviable distinction of being a witch, as well as of cursing people, and burning candles with the idea that the cursed person would fade away and die as the candle consumed.

In the case of Elena Daloc we have more detail. The official accusation declares Elena to have been 'a common scandalizer of her

neighbours, and charges her in the following manner—

'That she is an enchantress, and says that whoever she curses always departs from this life.'

'Because she herself says that many persons she has cursed have never afterwards lived.'

'Because she herself says that if she has heaven in this world, she does not care about a heaven in the future.'

'Because she herself heartily wishes to go to hell rather than to be with God in heaven, so that after death she can in the nether regions revenge herself upon her enemies of this life by torture.'

'Because she always holds converse with devils in preference to angels.'

'Because she never confesses to the priest of her parish.'

'Because she herself says that if she commanded it to rain it would do so.'

'Because she herself declares that she has a book which can foretell the future.'

What eventually happened to the unfortunate Elena we are unhappily ignorant of, for the records do not say; yet with such a full and terrible indictment staring her in the face, the

very least which the Archdeacon could have done would have been to excommunicate her, unless of course she was willing to recant her errors, and stand barelegged in a sheet for being an enchantress.

The offence of Joan Nocke and her husband was one which certainly merited punishment. The accusation was—'That she doth lure men to her house, and when she hath them there, she doth entice them into her chamber; her husband lying in the chamber cam downe, putting them in fear of their lives, and agrees with them for malt or money, or what he can get. And many have they used so, Thomas Wardell and Thomas Gilder of Chelmsford amongst the number.'

As neither of these parties appeared, they were excommunicated, which had the ultimate effect of placing them in prison.

Defamation of character, too, was another offence commonly tried in these courts.

A certain Ellen Cordee was proved to have said that she willed Arthur Dixon to take and saw off his horns, meaning thereby that his wife was not an honest woman. This lady was condemned in costs and allowed to go.

Not only in quarrels between husband and wife did the court interfere, but in those between

parties who were only living together. A Mr. John Belle was cited to show cause why he should not be excommunicated for saying to his paramour, Margaret Stansfield: 'Fy on thee, Harlot, what hast thou but of me, neither hose, nor shoo, nor kirtill, nor gown, but all of me. If I see thee speak anymore with him (apparently some lover) I shall kutt off thi nose.'

More reasonable was the intervention of the court in a case dealing with procuring; wherein Henry Whitehouse was brought up for procuring and soliciting several maidens and servants, and for taking a certain Margaret to the stews, and there inducing her to commit an offence for gain.

Speaking slightingly of priests, singing the litany flippantly, talking in church, were all offences; while in one case William Trene and his wife Elizabeth were cited, 'for that they made a filthie rhyme of the most part of the inhabitants of the parish,' and were ordered to do penance, which order they refused to obey, and were promptly excommunicated.

One of the most curious offences in the volume is, perhaps, that charged against Catherine Bankes, domestic servant of John Whitebread. The accusation runs, 'that she came in

man's apparel to the church, to the contempt of religion, thereby dishonouring God and disturbing the minister and the congregation. By way of punishment the judge commanded her to do penance dressed as she ought to be (viz. as a woman), with a paper specifying her offence pinned to her breast.'

The ecclesiastical punishments, with regard to laymen, consisted of excommunication and public penance. Excommunication was of two degrees, either the less or the greater; the less excommunication only excluding the excommunicated person from the participation of the sacraments.[1]

The greater excommunication, however, went considerably further. Unlike that passed upon the Jackdaw of Rheims, whereby 'nobody felt a penny the worse,' this ecclesiastical punishment had far-reaching effects.

The excommunicated person could not serve upon a jury; he could not be a witness in any court, nor could he bring any action to recover lands or money due to him. But this was not all. At this point the general law stepped in and issued a writ to the sheriff of the county,

[1] As marriage was a sacrament, people excommunicated could not marry.

requiring him to seize the person of the offender, and imprison him in the county gaol until he should be reconciled to the Church.

As to penances inflicted by the court, unlike the penances in earlier times, which principally consisted of fasting, these generally consisted of some public act of humiliation. A woman, for instance, would be ordered to walk barefooted through the parish at the head of a procession, clad in a sheet, and holding lighted candles in each hand.

In a case of incontinence Katherine Braddowe, who was sworn and examined, said by virtue of her oath, 'that she did dwell with Thomas Hardyne of Witham three years and three-quarters.' The judge declared that Hardyne should look after the child (if she were with child), and make the young woman an honest mends, at the direction of the officer of the court, and also go three Sundays about the church with a twopenny candle, 'and declare the cause why he had done it.'

We also come across a certificate of penance done by Margaret Orton, who had evidently been detected in unchastity. The certificate runs—'Margaret Orton, according to her appointment, hath done her penance in the Parish

Church of Barking in Essex, before the second lesson at morning prayer upon Sunday the 18th day of March, and there was read the first part of the homolie against whoredom and adultery; and the people present exhorted to refrain from such wickedness.'

In the case of Elizabeth Weir, who had been guilty of defamation of character, the Bishop commanded her to do penance after this manner —'You shall go on Sunday next,' said he, 'to the church, and before eight men, the church-wardens, the queste-men and curate, shall say, "Masters, where I have spoken slanderous words I am sorry for it, and do desire you to forgive me."'

As a judicial system the above was in every way about as bad as could be devised. In the first place, there existed no definite code of laws from which people could find out what was and what was not an offence. In the second place, the evidence was obtained in such a manner that to find a parallel one must go to the Spanish Inquisition during its worst times. It was a system of domestic espionage, conducted by the apparatiors whose chief business it was to 'get up a case,' and for this reason alone it was open to grave objection.

Whether it had a beneficial effect upon the morals of the individuals subject to its jurisdiction is questionable. To array a woman in a white sheet for frailty, and point her out to the whole parish as an abandoned woman, could, to our mind, have no other effect than that of rendering her utterly callous, and reckless in the future.

As a deterrent upon others it might, perhaps, in a few instances, have been useful, but considering the nature of the fault, we are inclined to think only with a very few.

Points in criminal law affecting women.

We have seen, in a previous chapter, that by the law, save in a few instances, the wife was not allowed to give evidence against her husband in criminal trials, nor was his evidence to be taken against her.

But the criminal law favoured the married woman further than this; for if a wife were accused as an accessory to the felony of her husband, such as burglary, larceny, or robbery over twelve pence, she was entitled to be acquitted, if she pleaded that she was under the command of her husband, and could not contra-

dict him. If, however, the charge was one of keeping a brothel, this plea appears to have been of no effect, for the law considered that in offences of this class, touching the domestic economy or government of the house, the woman had the principal share, and that such offences were generally conducted by the intrigues of the female sex.

In treason, also, the wife could not plead this excuse, as the excuse is one based upon the fact that the wife is bound to obey her husband; but the husband having broken through the most sacred tie of social community by rebellion against the State, he was considered to have no longer any right to this obedience; in fact, if the woman obeyed him in this instance she did so at the risk of her life.[1]

Even if a woman were accused of being in the company of a thief when a theft was committed, she might plead that she was not in his company, but as his concubine, and save herself at the risk of her good name.

Benefit of clergy.—Benefit of clergy originally consisted in the privilege allowed to a clerk in orders, when he was prosecuted in the temporal

[1] This is also the case with regard to crimes such as murder, manslaughter, etc. for the same reason.

courts. On his pleading this, and proving that he was a clerk in holy orders, he was handed over to the ecclesiastical authorities, to be dealt with by them, the temporal courts only having jurisdiction over laymen. In England this privilege was extended to all laymen who could read, and it applied during this period to most capital offences. The culprit, it is true, could only plead it once, and was liable on second conviction to punishment, yet to those criminally inclined it provided no inconsiderable loophole of escape.

To a woman, however, the common law denied this benefit, no matter how learned she might be, for by no possibility, it argued, could a woman become a clerk in holy orders, and so during this period she was liable to punishment for her first transgression of the law.

It may be mentioned here that by the common law any woman condemned to be executed might plead that she was pregnant, and then execution would be stayed until she was delivered. In order, however, to test the truth of the prisoner's statement, a jury of matrons, or discreet women, were directed to inquire into the matter. If they brought in their verdict *quick with child* (for unless the

child were alive in *ventre sa mère*, the execution would go forward), execution was postponed until she was delivered, or proved by the course of nature not to have been with child at all.

So late as the year 1879 this practice was followed in a case of murder. The prisoner after sentence alleged pregnancy, and a jury of women was empannelled from among the spectators in court. These, with the help of a surgeon, made an inquiry into the matter, but finding that pregnancy did not exist, the prisoner was executed.

Strictly speaking the law only reprieves the prisoner until delivery takes place, yet in the majority of cases, at the present day, provided a female prisoner be proved to be pregnant, and subsequently delivered of a child, the death sentence would, in all probability, be remitted.

Punishments inflicted upon women.—Although during this period humaneness was not a virtue which any class of the people could boast, one might have expected to find somewhat more tenderness shown to the weaker sex than was actually the case.

It is true that by William I.'s laws we find that capital execution or mutilation on a woman

with child was to be postponed until after birth had taken place, and that under a statute passed in Henry VIII.'s reign women great with child, although vagabonds and beggars, were to be punished less on that account, but these are about the only instances where justice appears to have been tempered even with decency, to say nothing of mercy.

On the other hand, rigorous punishments, which women, as well as men, were forced to undergo, meet us on every hand. Every lord had in his manor a gallows, tumbrel, pillory, whipping-post and drowning-pit, which received as many female victims as male, the drowning-pit being especially kept for women who had committed theft. Women who had strayed from the path of virtue, and had taken up with a loose course of life, were liable to be stripped to the waist, tied to a cart's-tail, and flogged through the streets of London, suffering the same penalty as thieves and such-like law-breakers. These were but humane punishments compared to what the law allowed to be inflicted upon women for graver crimes. It was a common sight to see the body of a woman burning because she had murdered her husband, though it must be said that the hangman

generally managed to strangle the prisoner before the flames touched her body. So late as 1531 an Act was passed which declared that all those guilty of poisoning should be boiled alive, and in the market-place at King's Lynn, in the same year, the edifying spectacle of a young girl being boiled to death, for poisoning her mistress, was witnessed by a large crowd of both sexes.

CHAPTER IV

WOMAN IN PRIVATE RELATIONS

Daughter—Freeborn women incapable of being sold into slavery as under the Saxon law—Powers of a parent over his daughter—Parent's right to obtain damages for his daughter's seduction conditional on a constructive loss of service being proved—The daughter unable to sue her seducer—No legal power over the daughter given to mother during father's life—After father's death power given to mother—Women of age on marriage or at twenty-one—Legal capabilities of a girl under age to do certain legal acts—Illegitimate children.—*Wife*—Marriage—The law of marriage governed entirely by the ecclesiastical law—Considered a sacrament—Espousals—An example of 'a present espousal'—How espousals might be dissolved—Marriages—Impediments to marriage—Difference in religious belief—Non-consent of parents or parties—Consanguinity and affinity—Spiritual cognation — Adultery — Non-consummation — Pre-contract—Periods during which marriage could not be contracted—Marriageable age—Widows allowed by common law to marry within a year of husband's death—Bigamy according to ecclesiastical law—Second marriages not favoured by the Church—Man and wife considered by law for certain purposes as one person—How matrimony affected the wife's person—Custody of her belonged to husband—Could give her moderate correction—How it affected her property—Freehold estates—Leasehold

estates—Personal goods and chattels—How equity interfered for the benefit of a married woman—How matrimony affected her contracts and other transactions—She could not sue or be sued without her husband—Exceptions—Husband liable for his wife's contracts and 'torts' both before and after marriage—Legal advantages and disadvantages accruing to women by marriage.

IT will be remembered that under the Anglo-Saxon laws the power of a parent over his children was so considerable that he was allowed to sell his daughter into slavery.

Even if this right continued after the Conquest it lasted probably only a short time, and although many neifs or female slaves undoubtedly existed during this period, a woman once born free could not by any act of her own, or another person's, become a slave.

Yet the law gave to the parent a sufficient power over his daughter to keep her in order and obedience. He was able to correct her with corporal punishment, in a reasonable manner, or delegate this power to another, for this was for the benefit of her education. He had the control of her person, and could compel any one to give up possession if they withheld her from him.

By the common law a girl who was seduced had no right of action against her seducer, for

being a willing party, the law presumed that she suffered no legal injury by the seduction. But the parent, under certain circumstances, could bring an action for damages, if his daughter were seduced. Outrage to the parental feeling, however, was not the ground upon which he claimed recompense, for to sustain his action it was necessary for him to prove, that his child was at the time of the seduction in his service. The courts, it is true, required very slender evidence of this service, the mere fact that the child was living with him at the time being sufficient proof that the relation of master and servant existed between them. In assessing the damages, however, the jury were directed to take into account the dishonour done to the parent, the loss of service in reality being only a legal juggle whereby the defendant was brought into court.

So long as the father lived the mother had no legal power over her daughter, but in the event of the father's death she was entitled to the custody until the daughter was of full age.

The power of a parent over his daughter, according to the common law, lasted either until the daughter married or attained the age of twenty-one years.

As to the capabilities of a girl under age to do certain legal acts, the law was as follows—At seven years of age she might be betrothed or given in marriage. At nine she was entitled to dower; at twelve she was considered to have arrived at years of maturity, and might consent or disagree to a marriage; and it would seem that, provided she were of sufficient discretion, she also might bequeath by will her personal estate. At fourteen years of age she was at years of legal discretion and might choose a guardian; at seventeen she could be an executrix; and at twenty-one she became her own mistress, the parental control absolutely ceasing.

With regard to an illegitimate child, the mother was entitled to the custody, and was bound to maintain it until it married or arrived at the age of sixteen. The father, it would seem, in early times at least, was not responsible for his illegitimate children; but the ecclesiastical courts could, and occasionally did, use their influences to make the putative father contribute to the support of the child.

Wife.—Previous to the Conquest, as we saw in Part I. when dealing with the laws relating to marriage, this custom was, amongst the

Anglo-Saxons, considered very much in the light of a commercial bargain.

After that time, however, the spiritual courts began to assume a complete jurisdiction over marriage, a very remarkable change coming over the law touching this matter. It is probable, however, that during the eighth and ninth centuries, the Church already had assumed no small portion of this special jurisdiction, a jurisdiction which the ecclesiastical courts retained down to the middle of the present century.

As, according to the Church, marriage was considered a holy sacrament, typifying the union of Christ with His Church, it is not surprising that the civil lawyers deduced from this theory some remarkable doctrines concerning matrimony. Previously to the Reformation the law of marriage became so complicated, and the legal impediments against entering into this state so manifold, that a marriage incapable of being impugned must have been of somewhat rare occurrence.

Not the least curious of these doctrines was that applied to espousals, which resembled in a few respects the engagements of our own day.

An espousal, properly speaking, was a promise of marriage, which was to take place at some future time, the man saying to the woman, 'I *will* take you for my wife.' There were either simple espousals, as when the man merely said he would marry the woman in so many words, or else where an oath was taken to marry, or a pledge, such as a ring (the origin of our engagement-ring), given as a proof of the contract.

To make an engagement good, it was necessary that it was contracted by consent, and some proof of this consent was required, such as agreeing to the contract in so many words, by a letter, or some sign, such as the giving of a ring, a gift, a kiss, or embrace. The mere gift of a ring, however, was not enough, unless it was accompanied by some sign or words expressing that it was given by way of espousal, whilst if any doubt existed on this head, the question was determinable by the judge of the ecclesiastical court.

All persons who were over the age of seven years were competent to espouse, and even if they were under this age the espousal was held good if it were ratified later by a regular consent.

So long as a person was not insane, and had

the use of his intellect he was capable of espousing, whilst if he were deaf and dumb he might express his mind by signs. It was allowable for a third party to act in this capacity, as the father for the son, the mother for the daughter, the uncle for the nephew, and the tutor for the pupil, but such espousals by proxy had no legal effect unless the party on arriving at the age of puberty signified consent to the contract.

When one was espoused to another, some special day was appointed upon which the marriage should take place, unless the espousal were what was known as a conditional espousal, which made the performance of the contract depend upon some event, and until that took place it had no effect.

Suppose, for instance, a boy of twelve were espoused to a girl of eight, the condition being that the marriage should not take place until the boy had received knighthood. If by any chance the boy never won his spurs, the contract would fall to the ground, provided the parties had never come together as man and wife, in which event the contract would be deemed good, in spite of the condition being unfulfilled.

The effect which an espousal had upon the contracting parties was that when once contracted neither could make a fresh espousal. Moreover, each of the parties had a right to institute a suit to compel the other party to celebrate the marriage at the appointed time, and in the event of either party refusing, an ecclesiastical punishment was imposed for disobedience. Still the court, as a rule, would not compel the parties to marry, because it very wisely conceived that to force a marriage between two persons, who mutually hated each other, would scarcely be conducive to a happy future for either, and so it dissolved the contract, and inflicted a penance upon the party who refused to carry out the contract.

If before the time agreed in the contract, the espoused parties came together as man and wife, the marriage was held to be complete without further ceremony, the court holding that the parties intended to perform the promise, and this presumption could only be done away with by showing that before this event, the espousals were either legally dissolved, or were in themselves null and void.

It sometimes happened that a person would espouse himself two or three times over. In

such cases the first espousal was held good unless the parties to the second had come together as man and wife, this then being held to be the better, the parties thereto being considered as man and wife.

That the ecclesiastical courts looked upon an espousal almost in the same light as an actual marriage may be gathered from the fact that it created such a relationship, that the blood relations of the *spousus*, or betrothed man, could not upon his dying before actual marriage, or the legal dissolution of the espousal, marry with the *spousa* or betrothed woman, or *vice versâ*.

Occasionally espousals were what we may term 'present espousals,' and then the parties were considered as man and wife. To explain this more clearly we will give the evidence of a mother, sworn before the ecclesiastical court in a case which occurred in the sixteenth century. The evidence is that of a widow named Rame, and is as follows—'For the space of a year and a half there had been good-will in the way of marriage between William Meade and Margaret Rame (daughter of the deponent), and the said Margaret Rame confessed the same to me (her mother), and she did well like

thereof, and further that on Michaelmas day a year ago the said William Meade in her house in Much Waltham, falling in talk with her, declared unto her that he had obtained the good-will of her daughter Margaret Rame, and in talking of marriage requested her (the widow) that she would grant her good-will likewise and give her consent. She (the widow) then said, "I perceive that you are both agreed," and that it was their own match, and she consented and prayed God that they might do well, and thereupon the said William Meade taking the said Margaret Rame by the hand, who then stood by, said unto her, "Margaret, now that I have your mother's good-will also, I do here now take you to my wife, and I do give you here my faith and troth." She, the said Margaret, holding him still by the hand, answered, "And here I do likewise give you my faith and troth, and do promise to be your wife," none being there with them save me (the widow). She (the widow) thereupon requested them that they should go to her son-in-law Richard Dane to make him privy to it, and that there might be a day appointed for the marriage, which thing they did, and afterwards were considered man and wife.'

Espousals might be dissolved in several ways—by mutual consent, or by the Judge, even if the espousal was sealed by an oath —by one of the parties entering into a religious life—by fornication and heresy—by lapse of time, as, if they let the day mentioned in the contract pass by, or, if no day were fixed, then for three years—by failure to perform a condition, if the espousal were a conditional one—by a deadly feud springing up between the parties, or by asperity of manners in either party—also by deformity or any contagious disorder. This last reason appears to have been pleaded and allowed in the ecclesiastical courts, for we find a certain William Walford of South Farnbridge, brought up before the court for: 'That he was asked in church, and had proposed to have married a certain Joan Packman, but for secret causes, and especially for that the said Joan was not sound in body nor had any hair on her head, he will not proceed any further.'

The court appears to have sympathized with the gentleman, and decreed that he was not bound to marry a weak-constitutioned and bald-headed woman.

Under the above circumstances, other

espousals might be contracted, even without the authority of the Judge, if the facts were notorious; but if not, the parties were bound to go before the Judge, and place the matter before him.

Let us now pass on to actual marriages, and in the first place see what impediments existed at that time which debarred a person from entering into matrimony.

In the first place, it was essential that the parties to be married should be of the same religion.

By the ancient law of England any man marrying a Jewess, or any woman marrying a Jew, committed felony, and the party so offending was burnt alive, or, according to the author of *Fleta*, buried alive.

Under the ecclesiastical law people marrying Pagans, Turks, or Jews were liable to excommunication, and all such marriages were absolutely void.

The consent of the parents, provided the children were under age, was likewise essential to a valid marriage, as was also the consent of the parties to the marriage, and if any force were brought to bear on the parties, so that they married through fear, or any error existed in

their minds, the marriage was void. This fear, however, had to be of such a nature that the man or woman actually apprehended some injury, whilst the error had to be concerning something necessary to the marriage, such as the identity of the party, and not merely a mistake as to his rank or fortune.

If the parties were within the prohibited degrees of blood or marriage, the marriage was void.

Not only was the above an impediment to marriage, but likewise what was known as spiritual cognation. This was a spiritual relationship, which, under certain circumstances, the ecclesiastical law presumed to exist between certain individuals. For example, if a man stood godfather to a child, that child could not marry his godfather's daughter, because a spiritual relationship, having the same effect in marriage as a blood relationship, was deemed to exist between them.

Another impediment sprang up under the following circumstances. If a married man contracted espousals with another woman in his wife's lifetime, and they came together during the first wife's life, as husband and wife, the woman knowing at the time that he was a

married man, on the death of the first wife these parties could not be married.

Amongst other impediments we may include inability to consummate the marriage, and a pre-contract, unless dissolved.

During certain times the Church decreed that no marriages should take place, viz. between Advent and Epiphany, from Septuagesima to the octave of Easter, and from First Rogation Day to the octave of Pentecost. Under the ecclesiastical law it was necessary that a marriage should be celebrated publicly in church, and with all due solemnities, before witnesses, while the parish priest pronounced his benediction upon the parties.[1]

The requisite solemnities appear to have consisted in the propounding of the marriage by a priest, who was to fix a time within which those who knew of any impediment should come forward and declare it, the priest himself in the meantime noting any impediment which he himself might discover.

Another form of marriage, which though

[1] Some writers affirm that originally there was no need of a priest nor of any solemnities, and that the parties who agreed to become man and wife became so by mutual agreement. This was so in Scotland.

illegal in the first instance was capable of becoming legal, was that which was known as a clandestine marriage. Such marriages were contracted without witnesses, and without solemnities; the children of the marriage were illegitimate, but the marriage might be transformed into a good one by the Church, if the parties were willing to publish it.

Yet it would seem that clandestine marriages were originally valid, and that parties so married could not release each other from the obligation, and either party could, by applying to the ecclesiastical court, force the other to have the marriage celebrated in church. So much importance was attached to these clandestine marriages, that if one of the parties married again, the marriage being celebrated in the church, the forsaken party could set aside this second marriage, bastardize the issue, and have the original marriage celebrated by the Church.

According to the common law actual marriage might take place between a boy of fourteen and a girl of twelve, which is the law even to this day.

By the old Saxon law, widows, it will be remembered, could not marry within a year

after their husbands' deaths, but, according to authorities, neither the canon nor common law raised this objection; for it was especially laid down that if a man died and his widow soon after married again, and a child were born within such a time as by the course of nature it might have been the child of either husband, he was said to be more than ordinarily legitimate, and when he arrived at years of discretion he might choose which of the fathers he pleased.

Yet at the beginning of this period it is questionable if this was so, for we are told by the author of the *Mirrour* that those who marry a wife within a year after the death of their first wife, and those who suffer themselves to be married within a year after the death of their first husband, are infamous, and to be punished by corporal punishments in divers manners.

According to the ecclesiastical law he who married a widow was a bigamist[1] as well as he

[1] The chief disadvantage in being a bigamist was as follows—If any one claimed benefit of clergy, the prosecutor could reply, saying: 'Sir, he ought not to enjoy the benefit of this privilege, for he hath forfeited the same by the sin of bigamy, as he who had married a widow, or many wives.'—*Mirrour.*

who married a woman repudiated (divorced), or was guilty of incontinence with a woman who had committed adultery. Even during this period a second marriage was looked upon by the Church with disfavour, and at such marriages the priest was expressly forbidden to pronounce a benediction upon the parties so contracting.

We will next consider the effect which marriage had upon women during this period. By the common law, for a few purposes, husband and wife were looked upon as one person. Originally it was held that a husband could not grant anything to his wife, nor enter into a covenant with her, for they were one, and a man could not grant or covenant with himself. This difficulty, however, was obviated by his granting to, or contracting with, a trustee for his wife, whilst by conveying land to a third person, for her use, he managed to give her a legal estate in the land so conveyed.

As we have before mentioned, a married woman was incapable of giving evidence for or against her husband in any proceeding,[1] save in cases of treason, or for personal violence which the husband committed against her; but

[1] This applied to civil suits.

here the theory of identity stopped. In most other cases, not only did the law consider husband and wife as separate persons, but held that the wife was in considerable subjection to her husband, the effect of such subjection being best considered under the following aspects, viz. as it affected her person, her property, and her contracts and other transactions.

As to her person, the custody of her undoubtedly belonged as of right to the husband, and any one taking her away from him was liable to an action for damages. He likewise had the right to give her moderate corporal punishment, for, according to Fitzherbert, who wrote in the sixteenth century, we are told 'that if a husband threaten his wife to beat or kill her, she is entitled to a writ for security of the peace, provided the damage is otherwise *than what to her husband, because of ruling and correcting his wife lawfully and reasonably belongs.*'

With regard to the effect of marriage on her property, we propose giving only an outline of the law on this subject as it stood during this period.

First, as to freehold estates held by the wife at the time of marriage, or to which she became

entitled after marriage, these became vested in her husband and herself, during their married life, the husband being entitled to *all* the profits, and having the sole control and management of the land. Moreover, if the wife were entitled to an estate of inheritance, and there had been a child of the marriage born alive and capable of inheriting the property, then the husband, upon his wife's death, became the sole owner of the land for his life.

A married woman had no power to sell any of her landed property, either with or without her husband's consent; but by means of a legal juggle known as levying a fine, this was capable of being accomplished.

As to leasehold property which belonged to the wife before marriage, or which she took after marriage, this went to the husband, and he could sell it if he chose, whilst it became absolutely his at her death. During her life-time, however, he could not leave it by will, and if he did not part with it during his life, and his wife survived him, it did not go to his executors, but remained her property.

Personal chattels or goods, money, furniture, etc., belonging to the wife before, or coming to her, after marriage, became the absolute property

of the husband. Debts, however, due to the wife only became the husband's if he sued for them, and received payment during his life, and if he died before he did this, they were payable to the widow. Moreover her bed, apparel, and ornaments, such as jewellery, etc., known as her paraphernalia, if not sold by the husband in his lifetime, remained her property, and did not pass to the representatives of the husband on his death.

Such was the law affecting the property of a married woman, but the Courts of Equity often stepped in to soften the somewhat rigorous rules of the Law.

Thus, if property happened to be left to a trustee in trust for a married woman for her sole and separate use, equity would recognize this trust, and prevent the husband from dealing with the property in a manner detrimental to the wife's interest. Even when the property was settled on a trustee for her benefit, yet not given to her for her sole and separate use, though equity was bound to follow the law and allow the husband to claim it as his own; yet it would not assist him in his claim, unless he agreed to make an adequate provision for her out of the fund.

Another restriction placed upon married women during this period was her inability to devise lands by will, a favour, however, which, in the early part of this period at least, the law denied to men as well. With regard to leaving her personal property by will, she was not in a much better position. With her husband's special consent, it is true she might dispose of her personalty by will, but the licence was only good if he chanced to survive her, and with one or two other technical exceptions, it was only under the above circumstances that a married woman was capable of making a valid will.

Marriage likewise had an effect upon her contracts and other transactions. Only as an executrix, or when she was invested with authority or power on behalf of a third person, could a married woman act independently of her husband.

She was also incapable generally of contracting, or doing any act which bound herself or her husband unless as his agent. She could bring no action to obtain redress for personal or other injuries except with her husband's concurrence, and in his name as well as in her own. If, however, her husband were civilly dead (if he had

abjured the realm, or fled the country), she could sue and be sued as a single woman, and she could likewise do this if she carried on trade in the City of London, the husband being prevented by an old custom from interfering with his wife under these circumstances.

On the other hand, the law gave her certain privileges. Thus the husband was bound to maintain her, and so contracts made by her for the purpose of supplying herself with necessaries suitable to her station as wife, were in most instances binding upon him.[1] She could not be sued for wrongs done by her, either before or after marriage, without the husband being made a co-defendant, the theory being that the husband was punishable for the wrongs committed by the wife; and he was liable to pay all the debts which she had contracted before marriage.

It will be seen, from the above outline of the law of husband and wife, during this period, that with regard to property the rights of woman were considerably retrenched on her entering matrimony. Her property on her

[1] This appears to have been the law prior to the decision in Manby *v.* Scott. Fitzherbert says—'A man shall be charged in debt . . . for the contract of his wife, if he giveth authority to his wife, otherwise not.'—*F.N.B.* 120 G.

marriage became absolutely her husband's during life, and this property at his death he might leave away from her except one-third of his goods, which passed to her by law.

On the other hand, she could claim a third part of his lands after death by way of dower; the estate, however, only being for her life, provided she had not been jointured previously to his death.

CHAPTER V

DIVORCE, ETC.

Adultery still considered a crime in the reign of William I., and punishable by express laws—Thenceforward an ecclesiastical offence only, and not punishable by lay courts—Marriage being considered a sacrament, the ecclesiastical courts refused divorce for matrimonial offences committed after marriage—Would annul a marriage if the parties had been illegally joined together—All impediments to matrimony, grounds for divorce, and upon parties producing proof thereof, the marriage was dissolved—Mere confession of parties sufficient proof—The frequency of collusion in matrimonial causes—Divorces *à mensâ et thoro* only separations, the parties being unable to marry again—Grounds for such divorces—Adultery, cruelty, etc.—Evidence in a divorce for cruelty—Alimony—Wife not allowed to leave husband without decree of the court—In cases of cruelty husband often bound to give security, not to assault his wife pending trial—Jactitation—Husband and wife could not separate unless both were agreed—Party not agreeable to separation could apply to court for order for restitution of conjugal rights.

EQUALLY with the law of marriage, the law of divorce underwent a remarkable change during this period.

Under the Saxon codes it will be remembered that although the wife was in most cases unable to procure a divorce, no matter what the conduct of her husband might have been, the husband, upon proof of his wife's adultery, had no difficulty in doing so, as well as in obtaining damages for the wrong done to him. Moreover adultery appears to have been a crime under the Saxon laws, the guilty wife being liable to mutilation of the face, if the husband were of a sufficiently vindictive nature to inflict the punishment.

By the laws of William the Conqueror also adultery was looked upon as a crime; though the punishment appears to have been shifted from the wife to the adulterer.

If for instance a father found his married daughter committing adultery in his own house, or in the house of his son-in-law, he was by the laws of William I. perfectly justified in killing the adulterer on the spot. By the same law, a son who took his mother in adultery, his father being alive, had also the right to kill the adulterer, whilst the price of the '*wer*' was still the forfeit of those who were guilty of adultery with their neighbours' wives.

By degrees, however, adultery ceased to be

regarded by the State as a crime punishable by the lay courts, and as in marriage, so in divorce, the ecclesiastical courts obtained a complete jurisdiction in this and other matrimonial offences.

As the ecclesiastical courts based their procedure on the theory that marriage was a holy sacrament, it necessarily followed that when once two people were joined by the Church in holy matrimony, no power upon earth was capable of separating them. And to this theory they held, according to the letter at least, with absolute strictness, for after a legal marriage, it mattered not whether the husband or wife committed adultery, coupled with or without cruelty, no dissolution of the marriage could take place.

The innocent party had, it is true, a remedy such as it was, but of this we will consider afterwards.

At first sight it would seem that in those days thousands of couples, who had in every way broken the matrimonial contract, were by the ecclesiastical law still forced to live either together, or separately, and to remain for the rest of their lives in a single state, the woman particularly suffering all the legal disadvantages which ensued upon entering the marriage state.

Yet when we consider the numerous canonical disabilities which existed at the time, and that any one of these was capable of rendering the marriage no marriage, it will be seen that in many instances the cases of the parties were not so desperate as at first sight one might imagine.

All the impediments to matrimony, which we mentioned in the last chapter, were grounds upon which a marriage might be called into question and pronounced invalid, the parties thereto being allowed to contract fresh alliances. A previous betrothal alone was sufficient. Consanguinity and affinity were so extended that seventh cousins could not contract matrimony with each other, whilst if a man before marriage had had intercourse with his wife's sister, this not only invalidated his marriage, but stopped him thereafter from marrying any of his wife's relations to the seventh degree, and in the event of his doing so the marriage could be declared void. The remarkable theory of spiritual cognation, together with physical incompetence and insanity, were likewise grounds for dissolving a marriage, and so it must rarely have happened that a marriage took place, which upon one or other of these

grounds could not have been dissolved and the parties pronounced capable of marrying again.

Considering that the mere confession of the parties was sufficient proof for the court, a door was opened to the grossest collusion; and that this often did take place there can be no doubt. A case in point was one in which a certain Collet married Mary Hix, and had several children by her. This couple wishing to be freed from the matrimonial yoke, instituted the following proceedings. The wife brought an action for a divorce *à vinculo* in the Spiritual Court against the husband, alleging that he had previously married Ann, her sister, the said Ann actually appearing and confessing to the marriage. Yet this case was afterwards proved to be one of collusion, Collet and Ann Hix never having been married at all.

In the above cases, the decree of the court was a divorce *à vinculo*, or in other words, a dissolution of the bonds of matrimony. According to the ecclesiastical law, the parties thus divorced had never really been man and wife, and the effect of the decree was to make all the children of this imperfect marriage illegitimate, such decrees being a fruitful source of the

bend sinister, which so often graced the arms of the nobility in early times.

The lay courts, although rarely interfering with those spiritual, would not allow the ecclesiastical courts to pronounce a marriage invalid after the death of one of the parties, although there existed the clearest proof that upon canonical grounds the marriage was utterly void.

If, however, the marriage, in spite of all these loopholes, was one which could not possibly be assailed in court, and one of the parties, by reason of the misconduct of the other, wished to live separately, the court was willing to grant a separation known as a divorce *à mensâ et thoro*, i. e. from bed and board.

The grounds for a separation such as this were wrongs committed after marriage had been entered into, such as adultery, cruelty, bad temper, etc., and it was in effect an interdiction from any cohabitation or mutual conversation, either for a time or generally without a given date, and in no case did it make the children illegitimate.

If the ground were adultery, it was necessary for the party asking relief to be free from any suspicion of unfaithfulness, for a wife or husband

so applying for a separation must not themselves have committed adultery, because if both parties were guilty there could be no decree.

Separations upon the ground of cruelty were granted upon the evidence of one of the parties only, no outside witnesses to the acts of cruelty apparently being necessary.

As an example of the kind of evidence accepted by the courts, we will give that found in a case occurring about this period. The husband first said by way of excuse that his wife refused to come to his bed, and took up some utensil filled with water and threw it over him. To this the wife replied that 'her husband had oftentimes been abroad nights and days spending away his *threyfft*, and when he came home he abused her and beat her; and moreover, that that same day he had said that if she would tell anything against him to the judge he would keep her with *steallts*, and whereas he had hitherto given her meat and drink, he would now give her bread and water; and that he did put a knife to her throat, and a halter about her neck, and that she went in fear of her life, for her husband often said to her that if it were not for the laws he would do otherwise with her, and she prayed for a divorce *à mensâ et thoro*.'

This relief the unfortunate woman appears to have obtained, the court dividing the goods equally between husband and wife 'until they did better agree.'

As a rule, a wife, pending an action for divorce, was allowed alimony, and this was either pending the hearing of the case or permanent. Alimony pending the hearing of the case, or, as it was called, alimony *pendente lite*, was a payment made to the wife by the husband, so that she might not starve while the case was preparing, and the wife was usually entitled to this even though the husband brought the suit, and alleged adultery against her.

Permanent alimony was a payment made after decree, and for the wife's life, but if it were proved that she had committed adultery, the courts would exonerate the husband from this payment, the wife being left to manage as best she could.

Without the permission of the court, a wife was not allowed to depart from her husband. If she did so, and the husband applied to the court, and prayed that she should be restored to him, his prayer was granted; but if the wife had left him on account of his cruelty, the court

required him to give security for treating her well. If, however, the cruelty had been such as could not easily be guarded against by any security, the court would not force the woman to go back to her husband, but committed her to the custody of some discreet woman until the grounds for a divorce were fully inquired into.

The power over married people which the ecclesiastical courts exercised, did not, however, stop here, another matter which came under their notice being jactitation of marriage. This action arose when a person falsely boasted and spread abroad that he or she was married to the person applying to the court for protection, though the only remedy which the court could afford was to enjoin upon the offending party perpetual silence on the subject.

With regard to separations between husband and wife, it was necessary that they should be voluntary; for if a husband separated from his wife, and she were not agreeable to the separation, she could apply to the court for restitution of conjugal rights.

Cases of this kind were of common occurrence during this period, taking more or less the form of the following:—'John Brown and Cicely his wife,' according to the Ecclesiastical Reports,

'appeared to have lived slanderously asunder, not being divorced.'

John Brown appeared, and proved that he married Cicely in Rayley Church some two years previously, but had refrained from her company for half a year, 'because that he thinketh she doth not love him'!

The wife Cicely likewise appeared, and confessed that her husband had refused her without cause, and thereupon the Judge commanded the husband to take back his wife, and to treat her in the future with all due affection.

Cases wherein husbands turned their wives out of doors, and wives maltreated their husbands, came also before the ecclesiastical judges, who throughout this period, what with dissolving marriages, separating bad-tempered husbands and wives, compelling others to live together, ordering co-respondents of both sexes suitable penance, and generally interfering with the domestic matters of the people, must have had a particularly busy time.

CHAPTER VI

SUMMARY

BOTH the civil and criminal laws in force throughout the early centuries of this period resemble in many respects those in force previously to the Conquest.

Whether or not the laws bearing the name of William I. and Henry I. be authentic or only a collection of old Saxon laws, more or less current during these reigns, is a question which cannot be decided with any degree of certainty, though that many of these were taken bodily from the old Saxon Dooms is beyond dispute.

What little legislation there was during the first two centuries of this period does not appear to have effected any great change in the position of woman, in fact, if we except the introduction of the feudal system into England, certain Acts relating to forest law, and the final separation of the ecclesiastical from the civil jurisdiction, the immediate effect of the Conquest was not to

alter the laws of England to any great extent. From the close of the fourteenth century down to the Reformation, however, many changes took place, both in the laws and habits of the English people, and we purpose to point out briefly the changes which were favourable and those which were unfavourable to women generally.

Of the changes most favourable to women, the growth of towns, itself an early step towards civilization, was perhaps the most important. Apart from the fact that this struck a fatal blow at the feudal system, which, as we shall see hereafter, was in principle most unfavourable to women, it was in the towns that commerce and the arts first appeared.

Men began to see that as much, if not more, was to be gained by selling useful commodities as by extortion and rapine, and in spite of the civil wars and general disorders which characterize this period, it was then that the first foundations of English commerce were laid.

Not only did this help to soften the manners of the people, but it opened the door of employment to women as well as to men. It is true, that during this period the number of women earning their living by following trades was

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comparatively small, but every year saw this number increasing, until so large did this class become, that the legislators of the nineteenth century were forced to introduce special laws dealing with female labour. The far-reaching effect which the opening of the labour market had upon the sex we intend to consider more fully hereafter. Yet even at this early stage it cannot be doubted that those women became the more independent who earned their own living; and independence, as every one knows, is power.

Both directly and indirectly was the feudal system unfavourable to women. Directly, because it was based upon the principle of national defence, and as men alone could bear arms, women had no part therein. Even when the system was no longer one partaking of a military nature, women as landholders were placed under disadvantages, whilst even after the system had vanished some of these disadvantages remained.

Indirectly the feudal system acted as a bar to the progress of civilization, and for this reason proved hostile to women, it being almost a truism, that the higher the civilization the better the position of woman becomes.

Much has been written upon the beneficial effects of chivalry upon the nations where the feudal system flourished, and that many knights were chivalrous, in the best interpretation of the term, is doubtless true. That a minority, by no means composed of small numbers, little better than bloodthirsty debauchees, innocent of every virtue save personal courage, were commonly to be met with in all parts of England, is a fact to which history bears ample testimony. When reading of the chivalrous behaviour of some noted knight, who at the risk of his own life releases from captivity a distressed and much-wronged damsel, one is apt to forget that the wrong-doer himself was in nine cases out of ten also a knight, bound by the same oaths of chivalry, to aid and succour the weak and afflicted.

Yet, though the knights themselves were not always bright examples of the doctrines of chivalry, chivalry did exercise a power for good upon the manners of the people. How much women gained by this we may gather from the fact, that courtesy to women was essential to the character of a true knight; in fact, one might almost say that the evils which the feudal system introduced into England were in part

compensated by the effect which chivalry had upon manners.

Small acts of politeness, such as the tendering of his seat by a man to a woman in an over-crowded railway carriage, would be an occurrence less common at the present day even than it is, if the knights of old had not deemed courtesy to women to be one of the chief characteristics of a gentleman.

If we compare the criminal laws dealing with the protection of women during this period with those contained in the Saxon Dooms, we shall miss in the latter period many laws which, theoretically at least, the Saxons thought necessary for the safeguarding of their women. We shall, for instance, find no statute wherein assaults upon women are priced on a graduating scale according to the gravity of the assault; but we shall find that before the end of William I.'s reign, the principle of compounding crimes for money began to be altered. A person guilty of rape was no longer allowed to go free on payment of a fine; and though in Edward I.'s reign the law dealt very leniently with this offence, reducing it in many cases to a trespass, the death penalty was soon re-imposed.

With regard to Edward II.'s law as to

abduction, one cannot help thinking that the offence which the law punished was not so much that of abducting the woman, as of robbing the lord of his rights by taking the woman out of his custody. On the other hand, the Statute passed in Henry VII.'s reign, dealing with the forcibly carrying off of a woman having substance in goods or land, with the intent to force her into a marriage, if any faith may be put in the preamble, savours more of the spirit of sound legislation.

In spite of such loopholes as benefit of clergy, sanctuary, an indifferent system of police, and during the eleventh and twelfth centuries the inability of the law to reach a powerful baron, surrounded as he was with a small army of retainers, the criminal law of England, during the latter portion of this period at least, was not the dead letter that it was before the Conquest. There were not so many laws perhaps whereby, nominally, women were protected as was the case in the preceding period, but what few there were, chiefly by reason of the punishments attached to them being no longer pecuniary mulcts, coupled with a more law-abiding spirit amongst the people, had the effect of saving many a woman from dishonour.

The severity of the punishments meted out to women by the criminal law were, however, throughout the period excessive. A foolish doctrine, whereby allegiance was presumed to exist between husband and wife, was used as an argument for burning the wife to death in the event of her killing her husband. The whip was used upon disorderly characters of the female sex, publicly and in no perfunctory manner. Any unfortunate woman who was old and crooked, if she chanced to have a few hairs upon her chin, a black cat, or the habit of living alone, ran a very good chance of being thrown into a pond as a witch by her more ignorant and brutal neighbours, whilst the ducking-stool and stocks were held *in terrorem* over all intractable dames belonging to the lower orders of the people. In spite of Christianity, chivalry, and something of civilization to which the nation had attained, the female sex undoubtedly came in for a large share of ill-treatment, an example which the law itself appears to have set.

Still it must not be forgotten that the women of these times were in many cases wanting in pity, decency, and all the better attributes of the sex. Woman devoid of

patience, gentleness, and sympathy is no pleasant object to contemplate. Such, however, was the character of a large number during this period. To rob dead bodies on the field of battle, and to kill those who were wounded in order the more safely to strip them of valuables, was a calling which women, as well as men, frequently followed during the Wars of the Roses and other civil disturbances. Crimes of violence, such as the strangling with her own hands of a lover or husband, were by no means unknown; and if the criminal law punished women with severity, many of those who suffered had by their behaviour almost forfeited the right to be regarded as belonging to what is termed the gentler sex.

As to the criminal jurisdiction exercised by the ecclesiastical authorities, though the system was a bad one, the Church must be acquitted of putting the law into operation for its own aggrandisement, as frequently happened in the preceding period. Theoretically, at least, the object of all punishment and censure was for the benefit of the individual, by pointing out to her the error of her ways. The punishments, mostly of a parental nature, were never severe, but could rarely be compounded for by

a money payment. Yet even if this system had had the effect of raising the morality of the people, few, we think, will admit that this would have compensated for so gross a violation of the liberty of the individual. That this end was attained is more than doubtful, but that the Church during this period should have imagined that morality could be enforced by the means of a white sheet, confessions, and burning candles is not to be wondered at, when we consider that there are many people even at the present day, who, in spite of the deplorable failure of the Puritanic party during the Commonwealth, are convinced that immoral people can be made moral by the magic of an Act of Parliament.

Of the marriage law little need be added to what has been already said. If the Saxons treated marriage in a perfunctory manner, the ecclesiastical lawyers who were introduced after the Conquest made up for this by surrounding the subject with all those intricacies and subtle distinctions of which they were so enamoured. Had the Reformation done nothing more than clear away the major part of these absurdities, it would still have earned much of the praise which is lavished upon it.

It has been remarked, that the married woman has always been a great favourite with the law of England; but the intelligent reader of the nineteenth century, particularly if she be a woman, will perhaps search in vain for any marks of special fondness shown to the married woman during this period by the common law of England. One is ready to admit that the Courts of Equity did now and again stretch a point in order to give a married woman the right of enjoying property which had been given to her with this special object. Yet, on the other hand, it must be remembered, that on marriage all the profits of her freehold lands went, not to her, but to her husband during his lifetime, whilst her leaseholds and all her personal property became absolutely his.

Moreover, the law of England looked upon her as incapable of making a will, or acting independently of her husband, and considered her so much under his subjection, that not only was she bound to stay with him for better and for worse, but it allowed him to correct her with personal chastisement, *solea pulsare nates*, if he thought fit. If she retaliated, however, and over-stepped the bounds of moderation, she might be tried for petit treason and

burnt at the stake. So long as her husband was alive, she was not even joint guardian with him of her children, nor until his death had she any legal power over the children of the marriage.

Provided that she lived with her husband, the law allowed her to contract debts for necessaries, and such debts under certain circumstances the law compelled the husband to pay; whilst if she committed a tort or wrong, the punishment of damages fell upon the husband, for the very good reason that the wife, having no property, was incapable of satisfying the plaintiff. But to say that the law treated a married woman with special tenderness, as Sir William Blackstone asserts in his Commentaries, a fiction which we believe was current long before Blackstone's time, is a statement which requires not a little qualification. On the other side, however, it may very reasonably be put forward that the law, by entrusting the husband with power over his wife's property, was in reality protecting her interests, the times being such that it required the energy and strong arm of a man, not only to protect his wife's person, but her belongings as well. The law, correctly perhaps in this

instance, deemed it better for her that she should surrender her property to her husband, who had promised to love and cherish her at the altar, than that she should hold it separately from him, whilst by giving him the management and profits of the land, it thereby ensured the husband's greater eagerness in retaining, and care in managing it, than would otherwise have been the case. Moreover, if we take into consideration the fact that property during these times chiefly consisted of land, in the management of which a woman was far less skilled and less able to carry out the personal duties than a man, it will be seen that much of what seems to us at the present day as unfair, is in part explained, and the law vindicated from any undue attempt to rob the wife for the benefit of her husband.

Unfavourable to women as we saw the preceding period was, the first two centuries of that now under observation appear to have been even more so. Where the position of women was not the same, it had invariably altered for the worse, the chief cause of this being the introduction of the feudal system into England.

At the close of the thirteenth century a

better system of criminal law had been gradually introduced. The seeds of commerce had begun to spring up, little by little, the people threw off the savageness of their manners, and as trade extended new ideas and new customs were brought under their notice. All this was favourable to woman, and though its effect upon legislation was not immediate, it was destined to bear fruit in the future. The Renaissance, the effect of which upon the Continent was almost magical, was not altogether unfelt in England, yet so gradual was the improvement in this country, that in order to notice any marked difference, it is necessary to compare the beginning with the close of the period.

Under William I. a woman slave was burned to death for theft, and during Henry VIII.'s reign a maid-servant who poisoned her mistress expiated her crime in a boiling cauldron; but in the sixteenth century a woman was not liable at any moment to be dragged from her home and parents, violated, and shut up in some castle by any baron whose army of retainers placed him above the law, a disaster which might very well have happened to her had she lived in the eleventh or the twelfth century.

PART III

A.D. 1534—1837

CHAPTER I

I. POSITION OF WOMAN AS A CITIZEN
II. POSITION OF WOMAN IN RELATION TO PROPERTY

Position of woman as a citizen.—The position of woman as a citizen but little changed by legislation throughout the period—Increase in the number of women following trades—Early legislation protecting women employed in factories—Provisions of the Bankruptcy Acts from and after Elizabeth's reign applicable to women as well as to men—Unmarried women having neither lands nor money forced to enter service—Sumptuary laws abolished in 1603.

Position of woman in relation to property.—Real property—Military tenures abolished throughout England together with the lord's rights of wardship and marriage—Dower at church door abolished, and the widow's dower at common law liable to be barred by husband by deed or will—Personal property—The old common law right of wife and children to two-thirds of a testator's goods no longer law.

FROM the date of the Reformation down to the accession of Queen Victoria, the position of woman as a citizen, though growing in

importance year by year, claims but a small part in the legislation of the period.

Her rights as a plaintiff, defendant, and witness; her ability, if a single woman, to make a will, remained unaltered, but throughout the whole three hundred years which we are about to consider, the position assigned to her by the law was but very little better than that which she held under the first monarch of the House of Tudor.

In respect to trade, we find several allusions to women as artificers in Acts of Parliament, notably in one passed in the year 1662 for regenerating the trade of silk-throwing. From this Statute we gather that in London alone over 40,000 men, women, and children were employed in this trade; whilst the manufacture of bone lace, band-strings, buttons, and needlework, callings which numerous Acts protected from foreign competition, opened a large field to female labour.

Passing on to the year 1802, we see the beginning of a class of legislation dealing with the protection of female artificers from overlong hours and unsanitary surroundings. This Act forbade the employment of apprentices in mills between the hours of nine p.m. and six a.m.; and required employers to provide separate

dormitories for their male and female apprentices, whilst in no case were more than three to sleep in one bed.

But perhaps the best example of the increase in the number of women, who not only followed trades, but traded on their own account, is to be drawn from a glance at the Bankruptcy Acts of this period.

The first Bankruptcy Act ever passed in England became law during the reign of Henry VIII. In this Act women do not appear to have been included, at least no reference whatsoever is made to women, the wording of the Act throughout being applicable to men only who 'make bankrupt.'

In the next Act dealing with this subject, however, which was passed in the thirteenth year of Queen Elizabeth's reign, women are specially mentioned; and by all the following Acts, a single woman, if a trader, was, on her inability to satisfy her creditors, liable to be made a bankrupt.

It may be gathered from this that the law not only recognized the right of a single woman to trade under the same conditions as a man, but that so large had the number of women-traders become, that it was necessary to include

them in all those Acts of Parliament dealing especially with the subject of bankruptcy.

Similar to the Statute of Labourers passed in Edward III.'s reign, was an Act of Parliament which became law in 1562. By this Act all unmarried women between the ages of twelve and forty, if they had neither lands nor money, were liable to be called upon to act as servants at a reasonable yearly wage, and in the event of their refusing, they could be imprisoned until they found sureties to serve as required.

Judging from the preambles of numerous Acts of Parliament dealing with rogues and vagabonds, wherein legislators complain of the increase of idle, disorderly beggars of both sexes, who obstinately refused to work, this Act appears to have been a dead letter, though it remained upon the Statute-book down to the year 1814.

The year 1554 saw yet another sumptuary law added to the already long list of Acts dealing with apparel; its chief object being to restrain all those whose incomes were below £20 a year from wearing silk. In the year 1603 this Act, and all others of a like nature, was repealed, legislators being convinced of the impossibility, as well as perhaps of the undesirability, of restraining women from the innate

love of adorning their persons in the most becoming manner that money can command and the art of the milliner suggest.

Real Property. — Until the year 1660 the rights of women with regard to real property remained unaltered. In that year, however, military tenure, with its attendant rights of wardship and marriage, was abolished, and all such tenures turned into *free socage*, or freehold.

It will doubtless be remembered, that the wardship in freehold belonged to the infant's nearest relation, not being the one to whom the inheritance could descend; and that at the age of fourteen this wardship ceased, the infant being then considered capable of choosing a guardian for herself.

To provide against young heirs and heiresses choosing improper persons as their guardians, this Act of Parliament, which swept away military tenures, enacted that it should be in the power of any *father*[1] to appoint a guardian by will until his child should attain the age of twenty-one years.

With regard to dower, little or no alteration occurred in the law governing this custom until

[1] The mother was unable to appoint a guardian by will under the Act.

1833. Long before this, however, 'dower at the church door' had fallen into disuse, but an Act passed in this year did away with it altogether. Moreover, the same Act declared that any husband married after January 1, 1834, could, by a declaration in a deed, or a clause in a will, bar his wife's right to dower, as well as subject this right to certain conditions and restrictions by will if he thought fit.

Not only could dower be barred by the act of the husband, but if the land to which the dower attached was subject to debts and incumbrances, these claims were valid and effectual, as against the widow's right to dower.

It will be seen then, that by the above Act the widow's right to dower was one dependent upon the will of the husband, for, by a stroke of the pen, he was enabled at the eleventh hour to devise his lands free from this claim.

It must not be forgotten, that previous to the Act dower could be, and very often was, barred by certain fictitious conveyances. In early times, when lands could not be devised by will, and personal property represented only a small part of the wealth of the country, dower formed the chief source of income to the widow. When, however, the law allowed testators to devise

their lands, and personal property had greatly increased, husbands were able to leave their wives sufficient property without burdening their freehold lands with the widow's claim for dower.

Personal property.—During the previous period we saw that the goods of a man were by common law divisible into three parts, two of which passed as of necessity to his wife and children respectively.

It would seem, however, that this old custom was no longer law in many parts of England at the beginning of the sixteenth century, though it existed in the province of York, the principality of Wales, and the City of London. An Act of William and Mary abolished this custom in York, one of William III. in Wales, and one of George I. in the City of London, by which Acts the law, as to bequeathing personal property, was made uniform throughout the whole of Great Britain.

The effect of this was that a testator was no longer bound to leave his widow or his children a third or any other share of his personal estate, but was entitled by law to bequeath the whole of his goods and chattels to a stranger, the claims of the widow and children to the contrary being totally barred.

CHAPTER II

CRIMINAL LAWS AFFECTING WOMEN

State of the criminal law at the close of the sixteenth century —Offences against the person—Homicide—Women convicted of petit treason still liable to be burnt—Executions for this offence common during the eighteenth century—The stake abolished as a punishment for petit treason—Abortion made a statutory offence and punishable with death—Concealment of birth—Unjustness of early Act governing this offence—Draconic statute applying to Scotland—Abduction—Rape—Bigamy no longer an ecclesiastical offence, but felony by Act of Parliament—Offences against public order—Unchaste women marrying with the King without disclosing their unchastity, guilty of treason—Offences against religion, morals, and public convenience—Women guilty of incontinence with priests liable to imprisonment—Witchcraft and sorcery—Statutes governing this offence—Trial of the Suffolk witches in 1665—Acts against witchcraft repealed.

THOUGH few changes are noticeable in the laws touching the position of woman in the State, or in those dealing with her rights with regard to property, the criminal laws affecting her were continually altering throughout

the period. Taken individually these changes were not always to the credit of humanity, or the progress of civilization. At the beginning of the nineteenth century many of the rigorous laws and cruel punishments which disgraced our criminal legislature were abolished, but throughout the three preceding centuries the spirit of our legislation appeared, not in the guise of Justice, unimpassioned and holding the sword and scales, but rather as one of the Eumenides, with a burning torch in one hand and a whip of scorpions in the other.

Offences against the person: Homicide.— The offence of petit treason, with its terrible punishment of burning at the stake, still remained as a blot upon the Statute-book. Even so late as the eighteenth century executions for this crime were but too common.

In 1721 Barbara Spencer, who was found guilty of the offence of coining, which was then deemed petit treason, both in men and women, was bound to a stake at Tyburn and burnt, the crowd which thronged to the place of execution, more savage and pitiless than any that filled the old Roman amphitheatre, pelting the unfortunate victim with stones and breaking ribald jests around the burning faggots. For

aiding and abetting John Quin, a labourer, in the murder of her husband, Mary Cornelius Beyley, on March 8, 1784, was drawn on a hurdle to the stake, and amid the jeers of the crowd burnt to death, being, we believe, the last victim of a law which had neither reason, justice, nor expediency in its favour.

In 1790, however, an Act was passed declaring that after the fifth day of June of that year, women convicted either of petit or high treason were no longer to be burnt, but to suffer death by hanging, and those already standing convicted of this crime were to take the benefit of the new law.

Abortion.—It was not until the year 1803 that an Act of Parliament was passed dealing with the offence of procuring abortion.

By this Act, however, it was declared that if any person should administer any deadly poison or other noxious and destructive substance to any woman *quick with child*, in order to procure abortion, even though the woman should not die from the effects of the drug, the penalty was death. If the woman were not with child, the person so administering the drug was to be set in the pillory and publicly or privately whipped.

From the wording of the Act it would seem that if the woman herself took any drug for the purpose of procuring abortion, it was no offence under the Statute.

Another Act passed in 1828, dealing with the same offence, makes no alteration in the penalty if the woman be with child, but substitutes transportation for the punishment of the pillory and whipping.

Concealment of birth.—Under this head we find a somewhat remarkable Statute in 21 James I. c. 27, passed in 1623. This declared as follows:—

'Whereas many lewd women that have been delivered of bastard children, to avoid the shame and to escape punishment, do secretly bury and conceal the death of their children, and after, if the child be found dead, these women do allege that the child was born dead (whereas it falleth out sometimes that the said children were murdered by the said women, their lewd mothers), it is enacted that if any woman after one month next ensuing the end of this session be delivered of any issue of her body male or female, which being born alive, should by the laws of this realm be a bastard, and that she endeavour privately either by drowning, or secret burying

thereof, so that it may not come to light whether it was born alive or not, but be concealed, in every such case the mother so offending shall suffer death, as in case of murder, unless such mother can produce at least one witness to prove that the child was born dead.'

The effect of this Statute was to alter one of the maxims of our law, viz. that a person shall be presumed innocent until he is proved guilty. It did not bring the prisoner into court with the object of condemning her, only in the event of finding unmistakable proofs of her guilt, but said, as it were, 'The law presumes you murdered this baby, and unless you can prove that it was born dead, the law will assuredly hang you.'

Yet it was not until 1803 that legislators saw the injustice of such a Statute. In that year, however, this Act was repealed, and for the future all trials of women accused of the murder of their bastard children were ordered to proceed, and be governed by such and the like rules of evidence and presumption as are by law used and allowed to take place in respect of other trials for murder. As, however, the concealment of births, if allowed to go unpunished, might open the door to infanticide,

the same Act gave permission to a jury, in the event of their acquitting the mother of murder, to find that she was delivered of a child, which if born alive would have been a bastard, and that she did by secret burying or otherwise endeavour to conceal the birth thereof. The punishment for this offence was imprisonment in the common gaol or house of correction for two years.

Similar to the above Act, though even more draconic in its measures, was one passed in the reign of William and Mary, but which only extended to Scotland.

It was around this Act that Sir Walter Scott wrote his story, *The Heart of Midlothian*, the victim being the unfortunate Effie Deans. The purport of this Statute was to fix the crime of murder upon every unmarried woman whose child was found dead or missing, provided she had concealed the fact of her being with child, and had not called in or made use of help or assistance at the birth of the child. In 1809 this Act was repealed, and in place of the death sentence a punishment of two years' imprisonment substituted.

Abduction.—During Elizabeth's reign the offence of abducting women, with the intention

of marrying them against their wills, was made felony without benefit of clergy.

Another Statute passed in the reign of Queen Mary aimed at the punishment 'of such as shall take away any maidens that be inheritours, being within the age of sixteen, or that marry them without the consent of parents.' For this offence the punishment was imprisonment for two years, whilst if violation or even matrimony followed such abduction, the party escaped somewhat leniently with five years' imprisonment or fine in the Star Chamber, half of the fine going to the Crown and the other half to the parents. If the girl raised no objection to such a Sabine marriage, the Act declared that her next of kin should enjoy the profits of her lands during the remainder of her life.

These two Statutes, however, were repealed, and in 1828 the forcible abduction of a woman with intent to marry her was visited by imprisonment and fine, imprisonment being also the penalty for unlawfully abducting a girl under sixteen from her guardian or parents.

Rape.—Save for a few trifling alterations, the law upon this subject did not change throughout the period. In Henry VIII.'s reign those

guilty of rape were denied sanctuary,[1] whilst in Elizabeth's reign the offence was made one of felony without benefit of clergy.

By an Act passed in 1828, not only was this offence made punishable by death, but also the carnal knowledge of any girl under the age of ten years, imprisonment being the punishment if the girl were over ten but under twelve years of age.

Bigamy.—The first Statute against bigamy was passed in the reign of James I., and the

[1] According to Blackstone, the law on the subject of sanctuary was as follows—'If a person accused of any crime except treason and sacrilege had fled to any church or church-yard, and within forty days after, went in sack-cloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence, and took the oath in that case provided, viz. that he abjured the realm and would depart from thence forthwith at the port which should be assigned to him, and would never return without leave from the King; he by this means saved his life, provided he observed the conditions of the oath by going with a cross in his hand, and with all convenient speed, to the port assigned and embarking. For if during this forty days' privilege of sanctuary, or on his road to the sea-side, he was apprehended and arraigned in any court for this felony, he might plead the privilege of sanctuary, and had a right to be remanded if taken out against his will.' By thus abjuring the realm, however, he forfeited all his goods and chattels. During the reign of Henry VIII. this privilege became much abridged, and was finally abolished in James I.'s time.

offence was declared felony and punishable by death. If, however, the first wife or husband of the prisoner had been absent for the space of seven years immediately preceding the second marriage, and was not known by the prisoner to have been living within that time, no sentence was passed, but the second marriage was for all purposes null and void.

In the year 1795 the offence was no longer capital, those convicted of this offence being transported.

Offences against public order: Treason.—A Statute passed in Henry VIII.'s reign declared that if any woman who was not a virgin married with the King, without previously discovering to him that her life had been unchaste, she was to be deemed guilty of treason, and should suffer death at the stake by way of punishment. The following reign saw this Act repealed.

Offences against religion, morals, and public convenience.—Under this head must be included a somewhat curious law passed in the reign of Henry VIII. dealing with the incontinence of priests. By this Act, any single woman detected as the paramour of a clerk in holy orders, upon the first conviction forfeited all her goods and

chattels; upon a second conviction, not only were all her goods and chattels impounded, but one-half of the profits of her lands was also sequestered; while a third conviction had the effect of depriving her of all her belongings, and imprisoning her for life.

If the woman were married she was, upon conviction, liable to imprisonment during the King's pleasure.

This Act was repealed a few years later, when the celibacy of the clergy ceased to be the general custom in the Established Church.

Witchcraft.—The first law against witchcraft and sorcery placed upon the Statute-book was one passed in the reign of Henry VIII. By this all persons using invocations or other practices of sorcery, in order to discover treasure, or to destroy or injure any one, or to provoke unlawful love, were declared felons without benefit of clergy, and as such were ordered to be put to death.

In Edward VI.'s reign the above Statute was repealed, but in 1562 another Act against witchcraft was passed, whereby persons using invocations of spirits, or practising witchcraft whereby death ensued, were declared felons without benefit of clergy.

For practising witchcraft to the bodily harm of any person, upon the first conviction, the penalty was that the prisoner should stand in the pillory, and then suffer imprisonment for a year, while upon a second offence, the death-penalty was imposed.

To inspire love by means of incantations, or to discover treasure through the aid of evil spirits, was punished in the same way, except that upon second conviction, forfeiture of goods and life-long imprisonment were substituted instead of death.

Even so late as the year 1603, the belief in witches was sufficiently general to enable the Houses of Parliament to pass an Act even stronger than the preceding Statute. The mere invocation of evil spirits from 'the vasty deep,' irrespective of whether they came or not, was punishable with death, while the attempt to discover the whereabout of any treasure by supernatural agencies, or the concocting of any love potion was, upon the first conviction, visited by imprisonment, and upon the second with death.

With such an Act upon the Statute-book, trials for sorcery naturally sprang up in all parts of the country, the victims being in almost every instance members of the female sex.

Perhaps the best example of how these trials were conducted, and the kind of evidence upon which juries convicted, is to be found in that of the Suffolk witches, which came before Sir Matthew Hale and a jury at the Bury St. Edmund's Assizes in the year 1665.

The prisoners in the dock were Rose Cullender and Amy Duny, two unfortunate widows, who previously to the trial had obtained the unenviable reputation of being witches. They were jointly indicted for bewitching Elizabeth and Ann Durent, Jane Bocking, Susan Chandler, William Durent, and Elizabeth and Deborah Pacey, children of people living in the county of Suffolk.

The evidence given at the trial endeavoured to prove the following incidents. One morning Mrs. Durent, wishing to go out, asked the prisoner Amy Duny if she would, during her absence, nurse her little boy William, who was about a year old, and promising, by way of reward, to give her a penny for her trouble. Before she left the child, however, she cautioned Amy against giving it suck, and this Amy agreed not to do.

On the mother's return she found that her injunction had been disobeyed, and the two

women commenced quarrelling. On parting the prisoner made certain veiled threats against Mrs. Durent, and on the same night the child fell into a swoon, and continued in this state for weeks.

The mother at once concluded that her child had been bewitched, and immediately sent to a Dr. Jacob of Yarmouth, who appears to have enjoyed a great reputation for curing children who had fallen under the malign influences of evil spirits.

Dr. Jacob's advice to the mother was that during the day she should hang up the child's blanket in the chimney corner, and at night-time, if she chanced to find anything in it, she was not to be afraid, but straightway consign it to the fire.

This advice the mother declared she followed, and found, when she shook out the blanket preparatory to wrapping up her child for the night, a large toad! Happily, however, having a youth with her at the time, the pair chased the toad up and around the hearth, the youth finally capturing it with the tongs, and throwing it into the fire. Hereupon the toad made a terrible noise, and with a report like the explosion of gunpowder, vanished from their ken.

So much for the evidence of Mrs. Durent.

Another witness called was Samuel Pacey, who testified as follows—His younger daughter Deborah, who suffered from lameness of the legs, was one day sitting taking the air in the garden, when the prisoner Amy came to the house and requested to buy some herrings. This request Mr. Pacey refused, and though it was twice repeated, remained obdurate.

As in the former case, the old lady was said to have muttered some threats, which in this instance had the immediate effect of causing the unhappy Deborah to fall into a violent fit, and to feel acute pain in the region of her abdomen, as though pins were pricking her. 'She called out,' says the witness, 'more like a whelp than a reasonable creature.'

A doctor was at once summoned, but, unequal to ministering to a mind diseased, could make nothing of the case.

As, however, the child continued to call out Amy Duny's name, and declared that apparitions of the same frightened her, coupled with the pre-conceived idea that Amy was a witch, the good father concluded that she had in reality bewitched his daughter, and so indicted her under the Statute.

The fits of this child were, we are told, more or less continuous. Sometimes she would fall into a faint, after which she would bring up quantities of phlegm mixed with some forty or fifty pins! On one occasion the younger child went out of doors, but soon returned screaming, declaring that a little thing like a bee flew upon her face and would have gone into her mouth. Having delivered herself of this remarkable story, she fell into a swoon, after recovering from which, with much straining, she vomited a twopenny nail, the said nail being produced in court, and handed to the jury!

That Sir Matthew Hale himself believed the evidence his charge to the jury shows, and the final chapter to this remarkable story was a verdict of guilty, followed by a sentence of death.

These two unfortunate women were executed upon March 17, 1665, the bewitched children immediately recovering their health, the same moment that the foreman pronounced the word guilty!

Seventy-one years later an Act of Parliament was passed forbidding all prosecutions or proceedings against any persons for witchcraft, people pretending to exercise such arts being

liable to imprisonment for a year, as well as to stand in the pillory for the space of an hour, once in every quarter. In George IV.'s reign a further Act was passed, whereby any person using subtle craft, means, or device, by palmistry or otherwise, to deceive the lieges, was to be deemed a rogue and a vagabond, and punished as such.

At the present day, when one reads an account of a trial like that of the Suffolk witches, one is apt to marvel at the gross superstition of an upright judge and twelve jury-men, who in all seriousness actually condemned two women to death for an offence which now-a-days we consider incapable of being committed.

If the question, however, be carefully considered, we think that it will be found, that to the majority of people it is not so much the superstition itself that appears so repugnant, but the length to which such superstition was carried, viz. the hanging of the prisoners. Certain superstitions become obsolete, and others take their place, and it is for this reason that in the nineteenth century a judicial trial for sorcery would be an impossibility. Nevertheless, manifold superstitions exist at the present day, and

are fervently believed in by all sorts and conditions of men and women, the majority of which are every whit as unworthy of credence as the statement that Amy Duny caused Samuel Pacey's daughter to vomit up a twopenny nail.

CHAPTER III

CRIMINAL LAWS AFFECTING WOMEN (*continued*)

Common nuisances—The public stews closed by proclamation in Henry VIII.'s reign—Laws dealing with disorderly houses during the time of the Commonwealth—Subsequent legislation—Common scold—The cucking-stool used so late as 1809—Laws dealing with the illicit commerce of the sexes in 1650—Incest and adultery punished with death—Offences against morals in the ecclesiastical courts—These tribunals not abolished at the Reformation—The Court of High Commission—Exercised jurisdiction over morals—Abolished in 1640—Jurisdiction over laymen taken from ecclesiastical courts—Partially restored in 1661, but no *ex officio* oath to be tendered by judge—Subsequent legislation dealing with these courts—Excommunication in 1813—Vagrancy and disorderly conduct—Female vagrants publicly whipped—Points in the criminal law affecting women—Benefit of clergy—Extended to women, at first in cases of petty larceny only, but afterwards in all cases where this plea was allowed—Punishments inflicted upon women—The brank employed as a punishment in the present century—Its use illegal—Whipping in public a common punishment—Whipping in public abolished in 1817—Ceases to be a legal punishment in 1820—Prisons—Male and female prisoners allowed to mix promiscuously—Cruelty of gaolers and general bad

management of prisons as evidenced by Thomas Howard—Improvements in prisons at the close of the eighteenth century.

COMMON nuisances.—By a proclamation issued in the reign of Henry VIII. the stews of Southwark, which were established in the reign of Henry II., and had continued under the protection of the Crown down to this time, were abolished.

At common law, however, a keeper of a disorderly house was liable to be indicted, fined, and imprisoned, though not a few of such cases came under the cognizance of the ecclesiastical courts.

On the accession of the puritanical party to power, such mild laws did not fall in with the austerity or hypocrisy of the times. Those who, when the King's head fell at Whitehall, threw their hats up into the air and shouted for freedom, had yet to learn that Parliaments as well as kings could tyrannize, and other courts as well as the Star Chamber interfere with the liberty of the individual.

Amongst the remarkable pieces of legislation current during the Commonwealth, was an Act passed in 1650. By one of its provisions it was enacted, that all and every person from and after June 24, 1650, convicted of being

a common bawd, or keeping a common brothel, or bawdy-house, should for the first offence be openly whipped and set in the pillory, and there marked with a hot iron in the forehead with the letter B, after which they should be committed to prison for the space of three years, or until they put in sureties for their good behaviour for the rest of their lives. If they were convicted a second time of this offence they were to suffer death.

Upon the Restoration, this Act and others of a like nature were erased from the Statute-book, though in the strict sense of the term they never were Acts of Parliament, not being passed by both houses, and obtaining the assent of the reigning monarch.

Several subsequent Acts dealing with this subject were passed in the eighteenth and nineteenth centuries, whereby the keepers of such houses could be indicted, and punished by fine and imprisonment.

Throughout the whole of this period, the offence of being a 'common scold' was still punishable, one of the latest victims to suffer under this somewhat barbarous custom being a certain Jenny Pipes, *alias* Jane Corran, who in 1809 was paraded through the town of

Leominster, seated in the cucking-stool, and finally lowered into the water near Kenwater Bridge, by order of the magistrates.

Before passing on to consider the offences against morals coming under the jurisdiction of the ecclesiastical courts, we must return to the law which was passed during the Commonwealth, and which declared the offence of keeping a disorderly house worthy of death upon a second conviction. This same law punished incests within the Levitical degrees with death upon the first conviction. It enacted that in case any married woman should be carnally known by any man other than her husband (save in case of ravishment), and should be convicted of such offence, she should be guilty of felony, the man as well as the woman, and both should suffer death. If, however, the man were ignorant of the fact that the woman was married, or if the woman's husband remained beyond the seas for three years, or was reputed to be dead, in all such cases the prisoners were to be acquitted.

As to the illicit commerce of the sexes, the same Act declared as follows:—'If any man from and after June 24, 1650, shall have carnal knowledge of the body of any virgin, unmarried woman, or widow, every such man

so offending, and every woman, shall be committed to the common gaol, there to be kept for the space of three months, until they give security to be of good behaviour for the space of one whole year then next ensuing.' The indictment, however, was to be within twelve months of the offence, the confession of one party was not to be evidence as against the other, and the prisoner was to be allowed to call witnesses to prove his or her innocence.

Whether trials under this law were or were not of frequent occurrence there is no evidence to show, but the fatuity of such legislation was only too well exemplified in the terrible outburst of immorality which showed itself amongst all classes the moment that the restraint was removed.

Offences against morals in the ecclesiastical courts.—In spite of the Reformation, the ecclesiastical courts still continued to exercise jurisdiction over laymen, and cases similar to those described in the preceding part of this volume came before the Archdeacon, who meted out penance and admonition to the moral delinquents whom the apparatior brought before him.

In addition to these, the Court of High

Commission became during Elizabeth's reign an established tribunal before which the morals of laymen could be inquired into, and any shortcomings corrected by imprisonment, fine, or public penance.

Generally, those who appeared in this court belonged to a higher class of society than the people cited before the Archdeacon. Their wealth and position emboldened them to defy the apparatior, but they went like sheep to the slaughter on a summons to appear before the Court of High Commission. Though much of the time of this court was taken up in dealing with cases of heresy and Church discipline, it occasionally found time to inquire into cases of adultery and the like.

In April 1631 we find that Thomas Cotton and Dorothy Thornton, of Lichfield, were sentenced to do penance, Cotton being fined £500, and that both the prisoners were ordered to be imprisoned until this sum was forthcoming. Whether Cotton could not or would not pay does not appear, but for four years they remained incarcerated in Stafford gaol.

Examples such as the above might very easily be multiplied, and until 1640 the High Commission Court continued to inflict heavy

fines for trivial offences, the victims singled out being occasionally those holding high positions, but invariably belonging to the moneyed classes.

In this year, however, an Act of Parliament was passed which struck a death-blow at all ecclesiastical jurisdiction over laymen. It not only abolished the High Commission Court, but enacted that for the future no ecclesiastical judge should impose or inflict upon any of the King's subjects any penalty, fine, or amercement for any offence belonging to spiritual cognizance, and forbade any judge to administer the *ex officio* oath.

From 1640 to 1661, ecclesiastical courts with a criminal jurisdiction ceased to exist in England, but in Charles II.'s reign an Act was passed which repealed the Act of 1640, only so far as it applied to these courts.

But the nation had been for twenty years freed from the petty tyranny of the Archdeacon and his apparatiors. The corner-stone of the whole fabric of this system of criminal procedure, the *ex officio* oath, had been broken, and from thenceforth, although nominally they retained a certain degree of power over laymen, the ecclesiastical courts busied themselves in

matters appertaining to the Church—wills, marriage, and divorce.

In 1787 these courts were restrained from hearing actions for defamation, unless they were brought within six months, or for incontinence, striking, or brawling, unless instituted within eight months of the offence; whilst yet another blow was dealt at these tribunals in 1813, when it was enacted that the sentence of excommunication was for the future to have no other effect than that of imprisonment.

It will be remembered, that previously to this a sentence of excommunication had the effect of virtually putting a man without the pale of the law.

Long before this Act was passed, however, the Church had practically ceased passing such sentences, the reason being perhaps, as Baron Twysden remarked in a famous case, because of the indifference amongst the men of his time (*temp.* Charles II.) to such a punishment as excommunication.

Vagrancy and disorderly conduct.—According to ancient statutes, vagrants were, 'such as wake on the night, and sleep on the day, and haunt customable taverns, and no man wot from whence they come ne whither they go.'

Thomas Decker, in his *Belman of London*, gives us a very full description of the numerous classes of vagrants or beggars which infested the country during the sixteenth and seventeenth centuries, women as well as men being members of this strange community. Girls of all ages, from *kinchin morts*, as they were called when mere infants, up to *dells*, or girls of about sixteen, learned to prefer an idle, wandering existence to earning their living by following a legitimate trade or calling. In time these grew up to be *morts*, *doypes*, or *demaunders of glymer*, as the case might be, in all of which callings thieving and highway robbery were looked upon as necessary accomplishments. Small wonder is it then, that the law dealt somewhat harshly with these Ishmaels, whose hand was against all law-abiding people.

During Elizabeth's reign, we find a Statute which enacted that every rogue, vagabond, or sturdy beggar, irrespective of sex, should on apprehension be stripped naked from the middle upward, and be openly whipped, until his or her body be bloody. On this being accomplished to the satisfaction of the constable, the justices delivered to the prisoner a licence, setting forth the fact that she had been publicly

whipped, and stating the parish in which she had been born or obtained a settlement. To this parish she was ordered forthwith to depart, and a limited time was given her to accomplish the journey; whilst, if she loitered on the way, the licence empowered any constable into whose hands she might chance to fall to hasten her progress by another application of the whip.

In 1713 another Act declared that every woman who had previously obtained a legal settlement in one parish, and was found wandering and begging, or misordering herself, in another, should be brought before the justices, and on proof of misconduct should be publicly whipped, sent to the House of Correction, and then be passed on to her own parish.

During the reign of George II. an attempt was made to prevent the children of beggars from following the evil courses of their parents. By a Statute passed in this reign, children of convicted rogues might be taken from their custody and put out as apprentices, whilst all beggar-women delivered of children in parishes other than those to which they belonged, were brought up before the justices, who ordered them to be publicly whipped.

The policy of publicly whipping female

vagrants began to be doubted in 1792, and in that year it was enacted that in no case should a justice inflict the punishment of whipping upon any female rogue whatsoever.

The last Act dealing with the subject, during this period, was passed in 1822, and declared that all common prostitutes or night-walkers, wandering in the public streets or highways, should be deemed idle and disorderly persons, and as such be liable to a month's imprisonment.

Points in the criminal law affecting women: Benefit of clergy.—Before the year 1616, no woman was by law allowed to plead the benefit of clergy in arrest of judgment, although this privilege was allowed to men, provided the offence were one which was known as clergyable.

An attempt to remedy this injustice was made by passing a Statute in James I.'s reign, whereby women were allowed benefit of clergy in all cases of larceny under ten shillings and above twelve pence. On her pleading her clergy she was to be branded upon the thumb with the letter T, after which she was to be whipped, set in the stocks, and sent to the House of Correction for any term not exceeding one year.

Previously to the passing of this Act, in the same court, and upon the same day, it

might well have happened that the following somewhat curious anomaly might have been witnessed. A man indicted for stealing to the value of eight shillings, provided it were his first conviction, and upon his pleading benefit of clergy, would have been burned upon the hand, and set free. A woman, on the other hand, who had stolen goods to the value of two shillings, although it might have been her first and only step from the path of honesty, was by law unable to plead her clergy, and suffered the death penalty, mainly because she was a woman.

It was, however, another seventy-five years before legislators saw the injustice which the law governing benefit of clergy did to women. In 1691 this plea was allowed to women in all offences where it was allowed to men, and thus the law continued until benefit of clergy was totally abolished, early in the reign of George IV.

Punishments inflicted upon women.—The punishments inflicted by the law upon women found guilty of offences, increased rather than decreased in severity during the first century of this period.

The year 1547, it is true, saw the Act repealed

whereby people guilty of the crime of poisoning were condemned to be boiled to death; but during the reign of Henry VIII., the offence of treason was made to cover such a multitude of actions, that the stake must have claimed a terrible number of victims throughout the reign.

Wilful perjury, execrations against the King, refusing to abjure the Pope, judging or believing the King to have been lawfully married to Anne of Cleves, clipping money, and counterfeiting foreign coin, were all offences which, if committed by a woman, were deemed worthy of death by burning.

The inability of women to plead benefit of clergy must also have been no mean factor in increasing the number of executions amongst women; in fact, throughout the period the legislature appears to have acted on this principle, viz. that most offences merited death, but more especially if they were committed by one of the feminine sex.

Somewhat ingenious was the method of punishment which during the seventeenth century seems to have sprung up amongst the lower classes, for punishing females guilty of venal offences. We refer to the 'brank,' a contrivance whereby the tongues of scolding women and

disorderly characters were for a time effectually prevented from annoying their more orderly neighbours.

Mr. Andrews, in an interesting work entitled *Old Time Punishments*, gives the following description of this instrument. 'This (the brank) was an iron framework placed upon the head enclosing it in a kind of cage. It had in front a plate of iron, which, either sharpened or covered with spikes, was so situated as to be placed in the mouth of the victim, and if she attempted to move her tongue in any way whatever, it was certain to be shockingly injured.'

With the brank on her head the unfortunate woman was marched through the streets of the town. Sometimes, like a chained and muzzled bear, the beadle led her with a rope through the chief thoroughfares, the rabble jeering and hooting as she passed.

So late as the beginning of the present century the brank was used at Bolton-le-Moors as a punishment for prostitutes. The beadle fixed the bridle in the mouths of the frail offenders, tying it at the back of their heads with a bunch of ribbons of various hues, and in this plight marched them round the town.

One of the last, if not the last, occasion of the public use of the brank occurred at Altrincham during the reign of William IV. The victim, a great scold and gossiper, having been cautioned in vain, was as a last resource condemned to walk through the town wearing the brank. Being of an obstinate disposition she refused to move, but the authorities, determined upon making an example of her, chartered a wheelbarrow, and placing the refractory female therein, wheeled her round the market-place, and back to her house.

That the brank was employed as a punishment is incontestable, though it is very questionable whether its infliction was ever judicially imposed. Unlike the 'cucking-stool,' it had not the common law to plead for its legality, and no Act of Parliament authorized its use. As, however, its victims were mostly gathered from the lower orders, it may be for this reason that no case testing the legality of such a punishment ever came before the courts of justice.

Both the pillory and the stocks were often tenanted by women, the former, however, being abolished as a punishment, save in cases of perjury or subornation, in 1816.

What, however, strikes one chiefly on looking

at the penal laws passed during this period is the terrible frequency with which the lash was used as a punishment for women. To the already long list of offences for which we find women were liable to be whipped, may be added petty larceny, or theft below twelve pence, keeping a beer-house without a licence, stealing wool if a spinner, and even for the comparatively light offence of drunkenness.

That ignorant justices, like Shakespeare's Shallow, should, in all their insolence of petty office, have inflicted such a disgraceful punishment upon a woman is perhaps not to be wondered at, when the Lord Chief Justice of England during the reign of James II. set so ill an example. In a case heard before the notorious Jefferies, on sentencing a woman to be whipped, he is reported to have spoken as follows:—'Hangman, I charge you to pay particular attention to this lady. Scourge her soundly, man; scourge her till her blood runs down. It is Christmas time, a cold time for madame to strip, see that you warm her shoulders thoroughly.'

A few cases, which Mr. Andersen has gathered from all parts of the country, will serve to show how common was the infliction of

this punishment. At the Quarter Sessions in Devonshire in the year 1598, it was ordered that all the mothers of illegitimate children residing in the parish should be publicly whipped.

In 1690, in the town of Durham, a married woman named Eleanor Wilson was publicly whipped in the market-place, between the hours of eleven and twelve, the only offence laid to her charge being that she was drunk upon Sunday during the hours of divine service.

In the town of Nottingham, in the year 1768, for stealing a handkerchief, a woman was stripped to the waist, tied to the cart's tail, and whipped from Week-day Cross to the Malt Cross.

This wholesale whipping of women in public continued down to the year 1817. In that year legislators, doubtless beginning to see that such spectacles were not only useless as a means of suppressing crime, but demoralizing to all those who chanced to view them, passed an Act prohibiting the public whipping of females, imposing a term of hard labour as a punishment in its stead.

Three years later, thanks to the influence of such men as Thomas Howard and Sir Samuel

Romilly, another Act was passed, which for ever abolished the whipping of all females whether in public or private.

With regard to prisons, Howard, in his book on the state of the prisons in England and Wales, gives us a sad picture of woman's life in gaol. In many instances the authorities did not even separate the men from the women, nor had every prison a matron. The food was not only bad, but the supply insufficient. Unless a female prisoner were in a position to fee the gaoler, he often loaded her with heavy irons, refusing to take them off unless she paid him a given sum.

Speaking of the St. Albans Bridewell, Howard says—'At my last visit I found a girl, who was sentenced to a year's imprisonment, locked up all day with two soldiers in the work-room.'

In his description of the Wynmundham Bridewell occurs the following passage:—'There is another room for women, in which at my visit in 1779 there were four dirty and sickly objects at work, with padlocks on their legs, though they never went out in the court except on Sundays.'

Chiefly owing to Howard bringing facts such as the above to the notice of the public, an Act

was passed in 1782 for the better regulation of prisons. It provided that for the future male and female prisoners should be separated, no gaoler should flog any woman, nor should handcuffs be put upon them unless by special order, whilst in no case was a woman to be a keeper of a prison.

CHAPTER IV

WOMAN IN PRIVATE RELATIONS

Daughter.—Child under certain circumstances taken from custody of parent, if parent were deemed unfit for charge —Parents' right to correct children personally still acknowledged—Children of a household whipped when executions took place—Master's right to chastise apprentice—Case of Elizabeth Brownrigg—Mistress not allowed by law to chastise domestic servant—Was customary in eighteenth century—Extract from 'a diary of a lady of quality'—Illegitimate children—If child became chargeable to parish mother liable to be imprisoned—Act passed in 1809 whereby mother of illegitimate child might summon putative father for maintenance.

Wife.—Alterations in the marriage law after the Reformation—Lord Hardwicke's Act dealing with clandestine marriages—The evils remedied by this Act—Marriage Act of 1823—Its provisions—Secular marriages introduced in 1836—Husband no longer allowed to correct his wife with personal chastisement, but could only confine her to the house—Breach of promise of marriage.

THE power of a parent over his daughter remained throughout the period practically unaltered, most of the earlier decisions of the courts seeming rather to strengthen his position as natural guardian than otherwise.

In the case of Shelly *v.* Westbrook, however, it was decided, that where an infant of whatever age possessed of property, so as to fall within the jurisdiction of the court, was in the guardianship of a father or a mother, who in the opinion of the court was grossly unfit for the office, the child could be taken away and placed under the care of some nominee of the court.

This idea of protecting children from immoral surroundings we have already noticed in the Statute which took the children of rogues and vagabonds out of the custody of their parents, and bound them as apprentices, a principle which we shall see carried even further than this, both by decision and legislation, during the period following.

The right of parents to correct their children in a reasonable manner was still acknowledged by the law, as was likewise that of a schoolmaster or mistress, who stood *in loco parentis*.

How universal was the application of the rod may be gathered from the custom prevalent in the early years of the present century, of whipping all the children of a household, the good as well as the naughty, whenever an execution took place. Parents evidently believed with the author of *Don Juan*, that morals might be

mended by 'flogging upon all occasions,' and as executions were matters of weekly occurrence, parents and governesses had no need to complain as to the lack of opportunities for wielding the rod.

By a decision in the seventeenth century, it was held that an apprentice might lawfully be corrected with personal chastisement, the law doubtless extending this power to mistresses as well as masters. How this power was abused cannot be better shown than in the case of Elizabeth Brownrigg, which occurred in 1767.

James Brownrigg was a painter, residing at Fleur-de-lys Court, Fleet Street, his wife Elizabeth carrying on the occupation of a midwife. To the tender care of these wretches the parish delivered three female pauper children, amongst whom was a certain Mary Clifford, aged about fifteen.

As all these children were bound as apprentices, Mrs. Brownrigg was by law allowed to correct them in a reasonable manner, provided they were guilty of misconduct, and the unfortunate Mary Clifford had not been long with her new mistress before she became aware that Mrs. Brownrigg was determined to exercise the right which the law gave her.

For the most trivial fault Mary was ordered to strip naked, and with her hands tied to a water-pipe above her head, was soundly flogged by her mistress, a thick walking-cane being used as the implement of punishment.

Scarcely a day passed but one or other of the girls was corrected in this brutal fashion, until on July 31, 1767, Mary having incurred the resentment of Mrs. Brownrigg, was stripped and beaten five several times with a whale-bone riding-whip.

Upon the last occasion, although the girl was bleeding and covered with bruises, Mrs. Brownrigg hit her about the head and face with the butt end of the whip. Half-starved and half-clothed, as Mary Clifford had been for some months previously, it is not surprising that this usage resulted in her death.

Mrs. Brownrigg was indicted for murder, convicted, and condemned to death, and so incensed was the crowd with her inhuman behaviour, that on her way to Tyburn the populace implored the chaplain to desist from his ministrations, adding that if any prayers were to be said they should not be for her salvation, but rather for the speedy damnation of so inhuman a monster.

It is questionable whether in law a mistress was ever justified in chastising her domestic servants, but that mistresses during the eighteenth century were in the habit of correcting their maids in a somewhat motherly manner, may be seen from the following extract from 'a diary of a lady of quality.' The entry is that of Lady Francis Pennoyer, of Bullingham Court, Herefordshire, and is dated January 30, 1760. Apparently one of her maids had been speaking in the housekeeper's room about some matter discreditable to the family, and this her ladyship determined to punish.

'She (the maid) hath a pretty face, and should not be ready to speak ill of those above her in station. I should be very sorry to turn her adrift upon the world, and she hath but a poor home. Sent for her to my room, and gave her choice either to be well whipped or to leave the house instantly. She chose wisely, I think, and with many tears said I might do what I liked. I bade her attend my chamber to-morrow at twelve.

'Dear love, my maid came to my room as I bade her. I bade her fetch the rod from what was my mother-in-law's closet, and kneel and ask my pardon, which she did with tears.

I bade her prepare, and I whipped her well. The girl's flesh is plump and firm, and she is a cleanly person, such a one not excepting my own daughters, who are thin, and one of them, Charlotte, rather sallow. She hath never been whipped before, she says (what can her mother and late lady have been about, I wonder!), and she cried a great deal.'

From the above and other extracts of a similar nature, all which can be gathered is, that it was customary during the eighteenth century to whip impudent and disobedient maid-servants. The fact that Lady Pennoyer gave her maid the alternative of leaving or receiving a whipping, suggests that she was aware that she had no legal right to inflict corporal punishment upon her domestics. Such would appear to be the law: for a servant, no matter how menial may be her position, is not in absolute subjection to her master or mistress.

Concerning illegitimate children, we find a law passed in Elizabeth's reign dealing with the maintenance of such offspring. As we saw in the previous chapter, both the father and mother were liable to be whipped if the child became chargeable to the parish, the mother being generally sent to prison until she gave

sufficient security to indemnify the parish for the keep of her babe.

In 1609 another law was passed which enacted, that every lewd woman leaving a bastard chargeable to the parish should be committed to the House of Correction for the space of a year. If she were found guilty of this offence a second time, she was incarcerated until she put in securities for her good behaviour not to offend again. This Act, however, was repealed in 1810, and for the future the only punishment imposed was imprisonment in the House of Correction for twelve calendar months, which sentence, provided that the woman were of good behaviour, might be reduced to six weeks' imprisonment, whilst in no case was a woman to be committed until a month after her delivery.

All the above Acts treated the mother with not a little harshness, and made no provision for finding out the putative father and compelling him to contribute towards the support of the child.

By an Act passed in 1809, the reputed father of a bastard was made chargeable with the expenses incident to the birth, as well as with the costs of his own apprehension and order of application. Moreover, any woman who was

about to be delivered of an illegitimate child, might charge the reputed father on oath, and he was liable to be arrested upon a justice's warrant, and compelled to give security to indemnify the parish.

Wife.—The great change which took place in the marriage law at the Reformation was due to the abolition of many of the numerous spiritual obstacles to marriage which had gradually sprung up during the preceding centuries.

Having thrown off his allegiance to the Church of Rome, Henry VIII. gave his assent to the Act of Parliament which enacted, that for the future no marriage without the Levitical degrees should be impeached, whilst all marriages by persons not prohibited by God's law solemnized and consummated, should not be dissolved for any pre-contract not consummated.

Although this Act did not destroy every obstacle which the civil lawyers had raised against marriage, it did away with such absurdities as spiritual cognation, and espousals *de futuri*, when the latter were not consummated.

Eight years later, it was enacted that a pre-contract should be a good ground for dissolution, provided that the spiritual judge so decided; and so the law remained in this unsatisfactory

state until the passing of Lord Hardwicke's Act against clandestine marriages in 1753.

This Statute, after citing the great mischiefs and inconveniences which had arisen from verbal contracts of marriage, declared that for the future in no case whatsoever should any suit or proceeding be had in any ecclesiastical court to compel the celebration of any marriage 'in face of the Church,' by reason of any pre-contract either 'present' or 'future.'

How great an evil this Act remedied we may gather from Lord Campbell's description of the state of the marriage law previously to this date. 'Young heirs and heiresses,' he says, 'scarcely grown out of infancy had been inveigled into mercenary and disgraceful matches, and persons living together as husband and wife for many years, and become parents of a numerous offspring, were pronounced to be in a state of concubinage, the children being bastardized, because the father had formerly entangled himself in some promise which amounted to a contract, and rendered his subsequent marriage a nullity. In the public prisons, particularly in the Fleet, there were degraded and profligate parsons, ready for a small fee to marry all persons at all hours there,

or to go when sent for to perform the ceremony in taverns or brothels.'

The next important Act dealing with marriages was passed in 1823. It required not only the publications of banns, but that all marriages should thereafter be celebrated either in a church or chapel, unless a special licence were obtained. The ceremony was to be solemnized between eight and twelve in the forenoon, and two credible witnesses were of necessity to be present. If the parties were under the age of twenty-one years the consent of their guardians was required, all such marriages without such consent being absolutely void, if the parties had wilfully consented to the performance of the marriage in contravention of the Act. This Act also contained a provision, that when a valid marriage by licence or banns had been solemnized between persons, either of whom were under age, by means of the false oath or fraudulent procurement of one of the parties, the party so offending should be liable to forfeit all property which would otherwise accrue to him or her from the marriage.

Up to this time Jews and Quakers were the only sects which were allowed to marry according to their own usages, the foregoing Acts

making the celebration of matrimony, with these two exceptions, only valid when solemnized by a minister in holy orders, and according to the ceremonies of the Established Church.

By the Marriage Act, passed in 1836, secular marriages were introduced. Without going into details, we may remark that by this Act people could marry by the Registrar's certificate without licence in the four following ways :—

1. Before the Superintendent Registrar of a district, without any religious ceremony whatsoever.

2. In any building certified, according to law, as a place of religious worship, and registered as a place for the solemnization of matrimony, the law thus allowing the numerous sects of Dissenters to perform marriage ceremonies.

In both the above cases it was necessary that the Registrar should be present, as well as two witnesses ; that the parties to the marriage should severally declare that there was no impediment to their union, and that each should say to the other, ' I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my wedded wife or husband.'

3. In the Church of England, in such case without publication of banns, or ecclesiastical

licence, but the church had to be one within the district of the Superintendent Registrar who issued the certificate, and the consent of the minister had to be obtained, the person performing the ceremony being a duly qualified clergyman of the Church of England.

4. According to the usages of the Quakers and Jews, where both parties are of those persuasions.

With regard to marriages by registrar's certificate with licence, the formalities necessary to be observed in order to obtain the certificate were different, whilst the licence granted allowed marriages to be solemnized by any of the several methods aforestated, except that of the Church of England.

As to the effect which marriage had upon the person of women, for it is only under this head that a change is noticeable during the period, we find the law governing the husband's right of subjection considerably modified.

According to Fitzherbert, it will be remembered, a husband was allowed to correct his wife with personal chastisement, provided he did so in a moderate manner. So late as 1663, in the case of Bradley *v.* Wife, the court refused to bind the husband over to keep the peace,

at the suit of his wife, unless it could be proved that her life was in danger, 'because by law he had power of castigation.'

In 1674, however, the courts appear to have questioned this right of correction belonging to the husband. In Lord Leigh's case, the evidence went to prove that a difference had arisen between him and his lady about a settlement of £200 as pin-money. Lady Leigh proved ill-treatment, and prayed security of the peace against her husband. In the course of the trial Chief Justice Hale gave it as his opinion that the *salva moderata castigatione* mentioned in the register was not meant of beating, but only of admonition and confinement to the house in case of her extravagance, and decided that a husband had no right to chastise his wife with personal correction.

From that time forward to the close of the period, the only punishment which a husband was legally allowed to inflict upon his wife was confinement to the house, a marital right which in the period following we shall see taken away by the decision of a Court of Justice.

Before leaving the subject of marriage, it may not be out of place to touch slightly upon actions for breach of promise of marriage, which first

arose during this period. In the case of Holt *v.* Ward Clarencieux, perhaps the first action of this kind, which was tried in 1668, the court declared that there existed no precedent for such an action. Nor is this to be wondered at, when we consider that in those times a promise of marriage was construed by the ecclesiastical courts as a 'future espousal,' and the remedy was by suit to compel the reluctant party to celebrate the marriage.

After the year 1751, the date of Lord Hardwicke's Act, which abolished this right to sue upon a pre-contract, the actions for breach of promise of marriage became more frequent; but unlike the old ecclesiastical relief, that given by the secular courts was not an order to celebrate the marriage, but damages against the party who had broken the contract.

With regard to these actions generally the following may be stated. If the defendant be a man, and he can prove unchastity on the part of the woman, provided he find this out after the promise, this will constitute a good ground of defence, and it would appear that previously, both a man or a woman might have refused to carry out the contract, provided either found that the person to whom he or she

had made the promise suffered from bad health.

Every ailment, however, was not sufficient, but it had to be one that was likely to prove permanent, and to seriously interfere with the daily life of the party. Nor was this defence an unreasonable one. A woman has a legal claim upon her husband for sustenance, both for herself and children, in fact it is to him she has to look for bread. In order to provide this he ought to be in good health, and the fact that he is not so being concealed from her, might not unreasonably be held to vitiate the contract.

Recent decisions, however, seem to have considerably modified the above view. These cases would seem to suggest that now no infirmity, bodily or mental, which may supervene, or be discovered after the contract, unless it be incapacity on the part of the man, or want of chastity on the part of the woman, can be relied upon as a ground for refusing to carry out the contract.

CHAPTER V

DIVORCE, ETC.

Jurisdiction over matrimonial matters still confined to the ecclesiastical courts—The indissolubility of marriage questioned at the time of the Reformation—Report of the Commission instituted by Henry VIII. as to divorce—Parr's case—Foljambe's case—Uncertainty of the law as to divorce—Case of Lord Ross—Countess of Macclesfield's case—The first instance of divorce by Act of Parliament — Actions for criminal conversation—Divorce by private bill not allowed to women.

THE ecclesiastical courts, by the Act of 1640, although virtually losing their jurisdiction over laymen who had committed offences against the moral law, nevertheless still retained power to pronounce decrees of divorce, and to adjudicate upon most questions arising out of the state of matrimony.

At the commencement of this period, the ecclesiastical courts alone could dissolve marriages, a power which they only exercised when the marriage in the eye of the Church was one which had never been strictly legal, whilst

all the relief which they granted for offences committed after matrimony was a separation from bed and board.

At the time of the Reformation, however, the Church ceased to regard marriage as a sacrament, and the doctrine of indissolubility began to be doubted.

A Commission, sanctioned by Henry VIII., and which sat at intervals during twenty years, prepared an elaborate report entitled *Reformatio Legum Ecclesiasticarum*, and from this, one is able to gather the general view which was held at the time on the question of divorce.

It was suggested in this report that divorces *à vinculo* should in the future be granted for adultery, malicious desertion, and mortal enmities, and that the divorce *à mensâ*, which was simply a separation, should be altogether abolished.

In the case of Parr, Marquis of Northampton, which occurred in 1548, a commission of delegates held that the mere act of adultery dissolved the nuptial tie, and that a sentence of divorce given by the ecclesiastical court, though only in the form of divorce *à mensâ*, entitled the innocent party to marry again.

This, however, does not appear to have been the general idea amongst Churchmen, as Foljambe's case goes to show. Foljambe had been separated from his wife for adultery by a decree of divorce *à mensâ* pronounced by the ecclesiastical court. His wife living, he married again, but this second marriage was held to be void.

Throughout the reigns of James I., Charles I., and the period of the Commonwealth, the matter remained surrounded with uncertainty.

In the year 1666, an Act of Parliament was passed to bastardize the children of Lady Anne Ross, who had been proven guilty of adultery. On the passing of this Act, Lord Ross instituted a suit for divorce *à mensâ* in the ecclesiastical court, and obtained a decree. Now in all such cases it was the custom of the ecclesiastical court only to grant the decree if the party were willing to enter into a bond not to marry again during the life of the other, and Lord Ross entered into such a bond in this instance.

Being next heir to the Rutland peerage, he was strongly advised to re-marry, but the question arose as to the forfeiture of his bond. To overcome this difficulty, an Act of Parliament

was passed entitled, 'An Act to enable Lord Ross to marry again.'

This, however, was not an Act of Parliament dissolving a marriage, for in this instance the nuptial tie had been severed by the ecclesiastical court, and all which the Act did was to allow Lord Ross to go behind his bond.

The first example of a divorce by Act of Parliament is to be found in the Countess of Macclesfield's case, the history of the case being shortly as follows :—

The Countess was the daughter of Sir Richard Mason, and she married Charles Gerrard in 1683. Throughout their married life continual quarrels arose between the parties, until matters reached a crisis on March 2, 1684.

That day Gerrard wrote to his wife, who at the time happened to be on a visit to her mother, forbidding her to return to him.

The Countess appears to have obeyed her husband's order, but during the time she was living apart from him, she was delivered of two children, a girl in 1695, and a boy in the following year, both of which births she attempted to conceal.

The girl was christened in the name of Ann

Savage, was put out to nurse, but soon died. The boy was born at Fox Court, Gray's Inn Lane, was entered on the register as Richard, son of John Smith and Mary, and was sent away to Hampstead to be brought up.

Notwithstanding these precautions, the facts came to the knowledge of the Earl, who in the summer of 1697 applied to the ecclesiastical court for a divorce *à mensâ*.

This suit the Countess defended, but while it was still pending, the Earl instituted proceedings in the House of Lords for a Bill of Divorce.

By way of defence the Countess alleged that she had been turned out of her husband's house, and that when in 1685 he was under sentence of death for treason, it was through her intercession that he had obtained pardon, whilst even if the Bill were allowed to pass, her marriage settlement ought to be rescinded, and her fortune returned to her.

The Lords, considering that a *primâ facie* case had been made out, for it was generally known that the father of her two children was Earl Rivers, a Bill to dissolve the marriage and illegitimize the children was introduced by the Duke of Bolton, on January 15, 1697.

It occasioned not a little debate on account of there being no precedent for such a Bill, but on March 3, 1697, it was read a third time, and received the Royal Assent on the second of April following.

This was the first marriage which was dissolved by Act of Parliament, but the precedent set was one which was followed throughout the rest of the period.

It was generally necessary, however, for a husband, if he wished to institute proceedings for a private act of divorce, to commence an action for criminal conversation against his wife's paramour, wherein the whole facts of the adultery might be given on oath, whilst the jury was empowered to award damages to the husband for the loss of his wife's society.[1]

The law governing the question of divorce by Act of Parliament was not reciprocal, and did not allow the wife to apply for a Bill, no matter how badly she had been treated by her husband, nor could she bring an action for criminal conversation against another woman for committing adultery with her husband.

The only remedy which was left to her was

[1] The earliest case of crim. con. appears to be that of the Duke of Norfolk *v.* Sir J. Jermayne, tried in 1692.

an application to the spiritual courts for a divorce *à mensâ*, whilst even if she obtained this, she still remained to all intents and purposes a married woman, being incapable of marrying again until after her husband's death.

CHAPTER VI

SUMMARY

THE period through which we have just passed, although almost barren of legislation affecting the position of woman, is in reality the most important of any with which we have to deal.

That women should possess any rights beyond those of marrying, and giving her daughters in marriage, ruling over the cuisine of the household, and superintending the education of her infant children, was a thought rarely if ever entertained by the legislators of these three centuries.

Yet in spite of this, a great change was taking place, gradually and silently at first, as is the nature of all great changes, but one the far-reaching effects of which we ourselves have witnessed in the legislation affecting woman which has been introduced during the latter half of the present century.

Much has been written, and with undoubted truth, about the gross immorality which pervaded all classes during the time of the Restoration. Yet in spite of the licentiousness of manners, one cannot help thinking that this period proved, indirectly, favourable to woman. The sex, which previously had been, as it were, wrapped in swaddling clothes, began at this time to take its first lesson in walking. That she often fell is not to be wondered at. Such is the inevitable consequence of all first attempts. But that it was better for her to make this essay, than for ever to remain in the arms of her male nurse, the great majority of people at the present day will not, we think, attempt to deny.

That women did begin, metaphorically, to stand upon their feet at this time may be gathered from the literature of the period. Take, for instance, such characters as Congreve's Angelica in *Love for Love*, or Millamant in the *Way of the World*. Models of what women should be perhaps they are not, yet with all their faults they take a much higher view of the relation of the sexes than did the women of the sixteenth century. In their opinion woman was henceforward to be

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the companion of man, not his abject slave, who was to think herself highly honoured because he allowed her to rear his children and preside over his house. In order to become his companion, she began to see that it was necessary for her to know something more than how to make butter and dress elegantly. To cultivate her mind sufficiently to pass as a wit, the great aim of most fine ladies and gentlemen of the time, was at least a step in the right direction, and this step every lady of the *beau-monde* attempted to make. There was a marked endeavour on the part of the woman to make man look upon her, not as a nonentity, whose domain was to extend no further than the kitchen and the nursery, but as one who would bring to him something more than mere personal charms and a submissive spirit.

Nothing shows this better than a comparison of the views relating to matrimony expressed by Shakespeare and Congreve, through the respective mouthpieces of Katharine in the *Taming of the Shrew*, and Millamant in the *Way of the World*.

The former sums up to Bianca the duties owed by a wife to a husband in the following lines :—

'Fie, fie! unknit that threat'ning unkind brow;
And dart not scornful glances from those eyes,
To wound thy lord, thy king, thy governor:
It blots thy beauty, as frosts do bite the meads;
Confounds thy fame, as whirlwinds shake fair buds;

* * * * *

Thy husband is thy lord, thy life, thy keeper,
Thy head, thy sovereign; one that cares for thee,
And for thy maintenance: commits his body
To painful labour, both by sea and land;
To watch the night in storms, the day in cold,
While thou liest warm at home, secure and safe;
And craves no other tribute at thy hands,
But love, fair looks, and true obedience,—
Too little payment for so great a debt.
Such duty as the subject owes the prince,
Even such a woman oweth to her husband:
And when she's froward, peevish, sullen, sour,
And not obedient to his honest will,
What is she, but a foul contending rebel,
And graceless traitor to her loving lord?[1]
I am ashamed, that women are so simple
To offer war, where they should kneel for peace;
Or seek for rule, supremacy, and sway,
When they are bound to serve, love, and obey.
Why are our bodies soft, and weak, and smooth,
Unapt to toil, and trouble in the world,
But that our soft conditions, and our hearts,
Should well agree with our external parts?
Come, come, you froward and unable worms!
My mind hath been as big as one of yours,
My heart as great; my reason, haply more,
To bandy word for word, and frown for frown;
But now, I see our lances are but straws;

[1] See the offence of petit treason.

> Our strength as weak, our weakness past compare,—
> That seeming to be most, which we indeed least are.
> Then vail your stomachs, for it is no boot;
> And place your hands below your husbands' foot:
> In token of which duty, if he please,
> My hand is ready, may it do him ease!'

Such was, we have no doubt, in Shakespeare's time, the accepted idea, more or less, of the true position which a married woman ought to occupy.

Let us now go forward a century, and see how these views had altered.

In scene v. of Congreve's *Way of the World*, Mirabell and his *fiancée* Millamant hold the following conversation, wherein the latter stipulates for certain rights, which shall be accorded her after marriage:—

'*Millamant.* Positively, Mirabell, I'll lie abed in a morning as long as I please.

'*Mirabell.* Then I'll get up in a morning as early as I please.

'*Millamant.* Ah, idle creature, get up when you will. And d'ye hear, I won't be called names after I'm married; positively I won't be called names.

'*Mirabell.* Names!

'*Millamant.* Ay, as wife, spouse, my dear, joy, jewel, love, sweetheart, and the rest of that nauseous cant in which men and their wives are so fulsomely familiar. I shall never bear that. Good Mirabell, don't let us be familiar or fond, nor kiss before folks, like my lady Fadler and Sir Francis; nor go to Hide Park together the first Sunday in a new chariot, to provoke eyes and whispers, and then never be seen there together again; as if we were proud of one

another the first week, and ashamed of one another ever after. Let us never visit together, nor go to a play together, but let us be very strange and well-bred. Let us be as strange as if we had been married a great while, and as well-bred as if we were not married at all.

'*Mirabell.* Have you any more conditions to offer? Hitherto your demands are pretty reasonable.

'*Millamant.* Trifles. As liberty to pay and receive visits to and from whom I please; to write and receive letters without interrogatories or wry faces on your part; to wear what I please, and choose conversation with regard only to my own taste; to have no obligation upon me to converse with wits that I don't like, because they are your acquaintance, or to be intimate with fools, because they may be your relations. Come to dinner when I please, dine in my dressing-room when I'm out of humour, without giving a reason; to have my closet inviolate; to be sole empress of my tea-table, which you must never presume to approach without first asking leave. And lastly, wherever I am, you shall always knock at the door before you come in. These articles subscribed, if I continue to endure you a little longer, I may by degrees dwindle into a wife.'

That both Katharine's views and Millamant's stipulations were painted in somewhat strong colours we are ready to admit, nor is it reasonable to suppose that the majority of wives in Shakespeare's time were as submissive as the Tamed Shrew, or that those of William III.'s reign insisted upon their husbands knocking at the door before entering the room, as did Lady Wishfort's niece. Yet the above extracts give us a fair idea of

the views held upon matrimony during the respective times, and if we have dwelt at some length upon the subject, it is because we believe that much of the legislation which hereafter cut the bonds with which the married woman was bound hand and foot, was due to this change of opinion, which began to show itself during the seventeenth century.

Long before the reign of Charles II., in which military tenures were abolished throughout England, the feudal system had gradually begun to decay, leaving behind it only three incidents directly unfavourable to women. Two of these, viz. the rights of the lord to the wardship and marriage of his tenant's infant heir, were abolished in 1660, but the law which gave the inheritance to the younger son in preference to the elder daughter still remained. This doubtless appears a hardship to many women, whilst the law governing the descent of real property has come in for not a little criticism from all quarters. It cannot be denied, however, that many arguments can be brought forward in favour of the law of primogeniture, though perhaps there are less weighty considerations for preferring the younger son to the elder daughter.

If the law of primogeniture were to be abolished, and all the children allowed to succeed in equal shares to real property in the same way as is the case with personal property, large landed estates would gradually cease to exist. Even supposing this to be no evil, the difficulty of dividing land equitably among several persons, so that each would be satisfied with the share allotted to him or her, is an almost impossible task, and would lead, in many instances, to family disputes and protracted litigation.

Moreover, as the landlords would be always changing (for it is probable that if an estate were cut up into small pieces, some at least of the new proprietors would sell their portions), the bond between landlord and tenant would grow less strong year by year. An heir, settled perhaps in the north of England, who suddenly came in for some sixty acres of the parental estate situated in the south, would rarely give up the house in which he was living in order to build one upon the newly-acquired ground. He would probably sell it, and the estate which had previously been under one landlord would be split up into numerous little estates, each having a new landlord, who

probably would neither know the names of his tenants nor those of his neighbours whose lands adjoined his.

The arguments against the eldest daughter succeeding to the lands of her father in preference to the younger members of the family are, we admit, not so strong at the present day as they formerly were. In the old times there was a palpable reason for not allowing the eldest daughter to succeed. Apart from the feudal system it would have been objectionable, because on her marriage her property virtually passed out of the family, and went to the man to whom she was married. Moreover, all capacity for business was denied to women in those days, and the state of society was such that women could not very well take upon themselves the duties which fell upon the shoulders of a landed proprietor. Whether the times have sufficiently changed at the present day to allow of these duties being fulfilled by women is a debatable point. Even supposing the question could be answered in the affirmative, such an alteration in the law of descent could not, we think, take place until, not only the franchise, but the right to represent a constituency, had been granted to the female sex.

The criminal laws affecting women passed during this period give us but a poor opinion of the humanity of mankind during the seventeenth and eighteenth centuries.

That wife-beating should be prevalent amongst the lower orders of the people at the present day is, after all, not to be wondered at, when the law itself sanctioned the stripping and whipping of female offenders in the public streets during the early years of the present century. On the contrary, one is apt to marvel why it is that the people of to-day are not infinitely more brutal than they are. Pity for the sufferings of others appears to have been a virtue which the legislature endeavoured to eradicate from the breasts of the people by every means in its power. To the majority of legislators, the gibbet and the stake, the whipping-post and the pillory, were the only means by which society could be protected from criminals. To fit the punishment to the crime was a theory little heeded during those times, justice being too busy decapitating offenders with her sword, to inquire whether the offence of grand larceny ought to be punished with the same degree of severity as murder or rape.

We are perfectly aware that the actions of people of the last century are not to be judged by the same standard as those of the people of to-day. As a proof that our criminal laws were considered sanguinary, even by the judges themselves, we will cite a writer contemporary with the system, Sir William Blackstone. He says—'It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than one hundred and sixty have been declared by Act of Parliament to be felonies without benefit of clergy, or in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute; juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence; and judges, through compassion, will respite one-half of the convicts, and recommend them to the Royal mercy. Among so many chances of escape, the needy and hardened offender overlooks the multitude that suffer, he boldly engages in some desperate attempt to relieve his wants or supply his vices, and if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate

in falling at last a sacrifice to those laws which long impunity has taught him to contemn.'

Such was the state of our criminal laws at the close of the eighteenth century, a system which was at once inhuman and impolitic. Before the first quarter of the nineteenth century was passed, however, many of these rigorous laws were abolished, the stake was no longer used for women, the whip and the pillory, so far as women were concerned, ceased to be employed as instruments of correction. Previously the female criminal had suffered special pains and penalties, because she belonged to the female sex, now from some of these, for that same reason, she was to be excused. Nor have women become less law-abiding on this account, criminal statistics speaking most favourably for the sex as a whole.

The chief change which took place in the law of marriage, was that matrimony ceased to be considered as a sacrament, an alteration due entirely to the Reformation.

During the earlier centuries of this period, the law upon the subject was somewhat uncertain, and though the Act of Henry VIII. swept away many of the so-called impediments

to matrimony, it is not until the passing of the Marriage Act of 1836 that we find marriages treated as secular contracts, and parties allowed to enter into matrimony without first soliciting the help of the Established Church. This, however, was only the logical sequence of the tenets of the Reformed faith upon the subject, for if marriage were not a sacrament, custom was all that could be alleged against the secular marriage. Moreover, the Act removed a gross injustice, to which Dissenters, and all those without the pale of the Established Church, had previously been subjected, by allowing them, after certain formalities had been observed, to be married in their own chapels and after their own rites.

But a greater benefit than all these was the abolition of the espousal, which Lord Hardwicke's Act finally accomplished in 1753. One would have thought that the responsibilities of marriage, even in the eyes of the Church, were so great that every care would have been taken to impress upon the parties the gravity of the step which they were about to take. The pernicious system of espousal, however, had the contrary effect. People, while yet under age, were tricked into marriage before they

were aware of the fact, and without going through any ceremony; and if they ignored this connection and married, it might very well happen that some years afterwards they would one day awake to the unpleasant fact that their supposed wives were in reality their mistresses, and their children illegitimate. That such a system was doomed to fall sooner or later was certain, but that it should have lasted so long as it did, is not a little remarkable.

Clumsy as the principle of divorce by Act of Parliament undoubtedly was, it was at least a step in the right direction. With most of the impediments to matrimony taken away, and such loopholes as spiritual cognation and pre-contracts abolished, unless some such machinery had been introduced, divorces *à vinculo* would have been scarcely obtainable. Even as it was, they probably became much less frequent during this period than was the case before the Reformation. The expenses attendant upon a Bill of Divorce put the remedy out of the reach of all save the wealthy, nor must it be forgotten that a woman, no matter how rich, and irrespective of what bad usage she had suffered at the hands of her husband, could not obtain a divorce by Act of Parliament. This was a relief

granted to men alone, and it was not until the whole subject of divorce had been carefully revised by the legislature, and placed upon a totally different basis, that this relief was, in a limited degree, granted to women.

PART IV

A.D. 1837—1895

CHAPTER I

I. POSITION OF WOMAN AS A CITIZEN

II. POSITION OF WOMAN IN RELATION TO PROPERTY

Position of woman as a citizen.—Increase of legislation affecting woman as a citizen—Factory Acts—Importance of this class of legislation—Contagious Diseases Acts—Legislation giving woman a political status—Granted a vote in some cases, but not in others—Woman and the professions.

Position of woman in relation to property.—No alteration in the law with regard to single women.

PERHAPS the most remarkable feature of the social legislation of the last fifty years, is the great increase in the number of Acts of Parliament directly affecting the position of woman.

Previously to the nineteenth century, the legislature rarely paid woman the compliment of either discussing her needs or attempting to remedy the numerous injustices to which she was subjected, whilst the question of giving her any political status in the country was a subject

upon which the great majority of legislators were discreetly silent.

Whether it took twenty years or two centuries to bring about this change is a question which we shall consider hereafter, but the outcome of this shifting of opinions may be seen very legibly inscribed upon the Statute-book.

Now the bulk of this legislation may be divided into two parts—the first dealing with the protection of woman in her capacity of a wage-earner, and the second with the extension to her of certain political rights.

To the first part belong all those numerous Acts collectively termed the Factory Acts, and which, as the majority of their provisions are of a technical nature, we shall only mention generally.

So early as 1842 the employment of females in mines was declared to be illegal by Act of Parliament, and from that year up to the present time, laws have been passed, almost during every session, extending this principle of State interference for the benefit of female labour.

The hours beyond which no woman is to work during any one day, the time which is to be allotted to meals, the sanitation of the work-rooms, and other matters of a similar nature

are dealt with by these Acts. How far legislators have thought it advisable to interfere for the benefit of women engaged in manufactures, may be gathered from a clause in an Act passed in 1891, whereby no occupier of a factory or workshop shall knowingly allow a woman to be employed within four weeks after she has given birth to a child. Most people, we think, will not fail to see the foresight of such a provision. With competition daily increasing, and an overcrowded state of the female labour market, unless some such legislation as the above were introduced, the effect of female labour on the infant mortality of manufacturing towns would be even more unfavourable than it actually is. That the most careful legislation will be able to completely remedy this, is perhaps impossible, but that it has done much, and doubtless in the future will do more, to remedy what threatens to become a very serious evil we have no doubt.

As by the Contagious Diseases Act of 1864 the legislature, in principle at least, recognized prostitution as a calling, a short account of this Act should appear under this heading.

By this law, which applied to certain localities only,—viz. military and naval stations,—any medical practitioner, superintendent, or

inspector of police, could lay an information before a justice of the peace against any prostitute whom he suspected of having a contagious disorder.

The justice was then to serve the woman with a notice to appear before him, and the truth of the information was inquired into. If a *primâ facie* case were made out, the woman was ordered to submit to an examination at a certified hospital, and if this went to prove the correctness of the information, the magistrate ordered her to be detained at the hospital until she was cured, but in no case was she to be detained longer than three months.

If, however, she refused to be examined, or to conform to the rules of the hospital, or left the hospital before she was discharged, she was liable to be imprisoned for any term not exceeding two months. By the above Act, and an Amending Act, periodical examinations of all registered prostitutes were ordered throughout the several districts mentioned in the Acts.

All the laws, however, relating to this matter were finally abolished in 1886.

With regard to legislation giving a political status to women, the subject is not a little

curious, and appears to be based upon a somewhat arbitrary principle.

By several enactments and decisions of the courts, the law has allowed a woman to fill the following posts; amongst others, Overseer, Guardian, Churchwarden, Sexton, Governor of a Workhouse, Medical Officer of a Workhouse, Surveyor of Highways, Inspector of Factories, Member of School Board, Member of a Parish Council; whilst in the majority of municipal elections, it has accorded her a vote.

On the other hand, it has denied her right to sit as a County Councillor, to be returned as a member of Parliament, to perform the duties of a Mayor, Juror,[1] or to vote in parliamentary elections.

Both these lists might be slightly augmented, but the above are sufficient to show what rights of citizenship the law has allowed and what denied to woman.

If we search for any principle governing the law in its decisions in the above cases, beyond the bare wording of the Acts of Parliament creating the office, or conferring the right of

[1] She is capable, as we have seen, of sitting on a jury of matrons, empanelled to see whether a female prisoner be pregnant or not.

voting, we shall find but little to reward our search.

Why, for instance, should a woman be allowed to sit upon a Parish Council, but not upon the County Council? The functions of the two bodies, it is true, are not absolutely similar in every respect, but are they so different, that a woman may be allowed to be a member of the one and not of the other?

The law has given a single woman a vote upon the question of education, and the internal government of the county of London. Both the County Council and the School Board have the disposal annually of vast sums of money, and exercise powers affecting numerous trades, and all classes of people. For candidates for both these offices the law allows women to vote. But upon questions of imperial interest womankind must be silent. Why? Not because she is liable to be influenced in the exercise of her vote, because, were that the argument, she should never have been allowed to vote in municipal elections. Because she is incapable of forming a correct opinion upon imperial matters? Surely not, for the same argument would apply in those cases in which she now has a vote, if it apply at all. Whether or not

the Parliamentary Franchise should be extended to woman is a question which does not come within our province to discuss, but that the law should have given woman a vote on municipal matters, and denied her a vote in the election of members of Parliament, appears to us slightly inconsistent, to say the least of it.

Although all trades are open to women, such is not the case with all professions. According to one authority, a woman may be a deaconess of the Church of England, but she cannot by any possibility fill the post of clergyman. The army and navy are for obvious reasons closed to her; neither can she be a barrister nor a solicitor. The profession of medicine, however, has of late years been opened to her, whilst academical degrees, although refused to women at Oxford and Cambridge, can be obtained by them at London and Durham.

Such has been the remarkable change in the position of woman during the last fifty years, that it may be safely said, that no social legislation of any previous age has had such an effect upon society as the laws concerning woman passed since the accession of Queen Victoria.

Position of Woman in Relation to Property.—No alteration in the law dealing with the

rights of single women in relation to property, either real or personal, are to be recorded during this period, in fact, save for one disability, viz. the descent of freehold land to the males in preference to the females, a single woman in this respect stands in exactly the same position as does a man.

As to the alterations in the law which have taken place in regard to the property of married women, we shall treat of this subject in the chapter dealing with marriage.

CHAPTER II

CRIMINAL LAWS AFFECTING WOMEN

Death sentence abolished as a punishment for the majority of offences—Offences against the person—Abortion—Concealment of birth—Abduction—Rape—Abusing children—Assaults upon women and children—Bigamy—Offences against religion, morals, and public convenience—Witchcraft—Common nuisances—Lewdness—Criminal Law Amendment Act, 1885—Vagrancy and disorderly conduct—Law governing solicitation by prostitutes—The case of Miss Case.

SINCE the year 1837 the criminal law has undergone many considerable changes. The cruel punishments which were inflicted upon women throughout the eighteenth century were, as we have seen, no longer in use at the commencement of this period, whilst even the sentence of death ceased to be considered by legislators as the great and only preventative of crime. Such offences as larceny, burglary, and highway robbery were no longer deemed worthy of the extreme penalty of the law; and at the present day only three crimes are

punishable with death, viz. high treason, murder, and piracy with violence.

Offences against the person: Abortion.—By the previous statutes relating to this offence, it will be remembered that the degree of punishment turned upon the fact of the woman being quick with child, and that the penalty attached to the offence was that of death.

By an Act passed in the first year of Queen Victoria's reign, this distinction was removed, the death penalty abolished, and penal servitude for life substituted.

In 1861, however, the Act which still governs this offence was passed, whereby any woman who, being with child, shall, with intent to procure her own miscarriage, unlawfully administer to herself poison or other noxious thing, or use any instrument, or other means for that purpose, shall be liable to penal servitude for life, or for a term not less than five years.[1]

Moreover any person who, with a similar intent, administers to a woman (whether she be with child or not), or causes to be taken by her,

[1] In all cases where penal servitude is imposed, the term of imprisonment may be either the maximum term of penal servitude, or any term between that and the minimum term mentioned in the Act, or imprisonment with or without hard labour for not more than two years.

poison or other noxious thing, or who uses any instrument or other means with intent to procure her miscarriage, is likewise liable to the same punishment, whilst the mere act of supplying or procuring any such means knowing the same to be intended for the purposes of procuring the miscarriage of a woman, is a misdemeanour punishable with five years' penal servitude.

It will be noticed, that in all the preceding Acts the woman herself was not liable to punishment if she procured her own miscarriage, but by the Act now in force, she is equally liable with all other persons attempting to procure abortion.

Concealment of birth.—The old Acts upon this subject being repealed, a Statute was introduced in 1861, whereby it was made a misdemeanour, punishable with imprisonment not exceeding two years, for any person, by secret disposition of the dead body of a child whereof a woman had been delivered, to endeavour to conceal its birth, whether it died before or afterwards.

Abduction.—The existing enactments upon this subject are contained in a Statute passed during the same year as the above. To take any woman, of any age, or to detain her against

her will, with intent to marry or carnally know her, provided she have any interest in real or personal estate, is punishable with penal servitude for fourteen, or not less than five years, the same punishment being inflicted if the person causes her to be so married or carnally known by another, or with a like intent fraudulently takes away or detains a woman in such position, if she be under the age of twenty-one, out of the possession or against the will of her father, mother, or other lawful guardian.

In all such cases, the person so offending is incapable of taking any of her estate, interest, or property, which property (if marriage have taken place) is settled in such manner as the court appoints.

Similar punishments are awarded to all who take by force, take away, or detain against her will, a woman of any age, with intent to marry or defile her; whilst it is a misdemeanour punishable with two years' imprisonment to unlawfully take, or cause to be taken out of the possession, or against the will of her parents or guardians, any unmarried girl under the age of sixteen.

Rape.—Up to 1861 the punishment for rape was death, but by an Act passed in that year

penal servitude for life, or not less than five years, was substituted.

With regard to laws dealing with the abuse of children, we may mention, that to unlawfully and carnally know any girl under the age of twelve years is punishable with penal servitude for life, or not less than five years, irrespective of whether such girl consent or not; whilst previously to the year 1885, the carnal knowledge of any girl above the age of twelve, and under the age of thirteen, was a misdemeanour punishable with two years' imprisonment.

In 1885, however, the Criminal Law Amendment Act made this offence, if committed with a girl above the age of thirteen but under the age of sixteen, a misdemeanour punishable with two years' imprisonment, though by this law the defendant is allowed to give evidence on his own behalf, whilst it is to be deemed a sufficient defence, if the jury or court be of the opinion that the person so charged had reasonable cause to believe that the girl was above the age of sixteen.

Assaults upon women.—In the year 1853 a special Act (since repealed) was passed to punish those guilty of assaulting women and male children under the age of fourteen. The punishment appears to have been a somewhat

slight one, being only six months' hard labour, or a fine of not more than £20.

With regard to indecent assaults upon women, the Act of 1861 makes this a misdemeanour, the punishment being imprisonment with or without hard labour for any term not exceeding two years.

Bigamy.—The punishment for this offence, which ceased to be capital in 1795, is now penal servitude for not more than seven or less than five years, but otherwise there is no change in the law to record.

Offences against religion, morals, and public convenience: Witchcraft. No alteration in the law has taken place during the period with regard to this offence. The Statutes passed in the reigns of George II. and George IV. still remain upon the Statute-book, whereby all who pass themselves off as witches and sorcerers, and endeavour to deceive the lieges, are liable to be imprisoned as rogues and vagabonds.

Common nuisances.—Save for a few technical provisions introduced into the Criminal Law Amendment Act of 1885, the law relating to the subject of disorderly houses remains as stated in the preceding part of this volume.

Lewdness.—We purpose giving under this

head a short account of the legislative enactments dealing with the protection of women and girls.

In 1849 an Act was passed, whereby any one convicted of procuring any woman or child under the age of twenty-one years, to have illicit carnal connection with any man, by false pretences, false representations, or other fraudulent means, was punishable with two years' imprisonment.

By the Criminal Law Amendment Act, 1885, the following acts were made misdemeanours, and punishable with two years' imprisonment.

Procuring or attempting to procure any woman under the age of twenty-one, not being a common prostitute, to have unlawful connection within or without the Queen's dominions.

Making, or attempting to make, a woman a common prostitute within or without the Queen's dominions.

Procuring any girl to leave the United Kingdom, to become an inmate of any brothel.

Procuring the defilement of any woman by threats, fraud, or by the aid of drugs.

Moreover where, on the trial of any offence under this Act, it is proved to the satisfaction of the court that the seduction or prostitution

of a girl under the age of sixteen has been caused, encouraged, or favoured by her parents, or other guardians for the time being, the court may remove her from such custody, and place her with such persons as it shall think fit, until she attains the age of twenty-one years.

Vagrancy and disorderly conduct.—Although prostitution is not an offence under the English law, by the Metropolitan Police Act, every common prostitute, or night-walker, loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation, to the annoyance of any inhabitant or passenger, is liable to a fine not exceeding forty shillings.

It would seem that this clause has been interpreted by some Chief Commissioners of Police to imply, that a policeman who sees a woman solicit in the streets, is authorized to arrest her, and that a magistrate should convict the prisoner on his uncorroborated testimony.

In the year 1887 arrests for soliciting in the public streets were of common occurrence, and matters went on thus for some time, until a case came before the police courts which proved how liable to abuse was this power which had been committed to the hands of the police.

We will give the case, as reported by the

Evening Standard in their issue of June 29, 1887.

'Elizabeth Case, a modest-looking and neatly-dressed young woman of twenty-three, was charged with disorderly conduct by annoying foot passengers in Regent Street, about half-past nine o'clock last night.

'Police Constable Endacott, 42 D.R., deposed to seeing the prisoner in company with another woman stop a gentleman at the corner of Castle Street, another in Mortimer Street, and a third between Castle and Oxford Streets. One of the gentlemen expressed his satisfaction at seeing the woman in custody, saying, it was very hard he had been stopped three times in the streets since he had left church. Mr. Newton: What is this woman? Endacott said that from her manner he should say she was a prostitute. He had seen her about the streets three times during the last six weeks, and last night she was walking in the vicinity of Regent Street and Great Portland Street for about three-quarters of an hour. Prisoner denied the charge. The constable must have been mistaken in her identity, she was a respectable woman, and not one of the class described. She left her home at a quarter past eight and

walked along Tottenham Court Road and Oxford Street, and then round by Mr. Jay's Mourning Warehouse. Then she returned. There was a crowd, and as she was passing through it, the constable appeared and took hold of her arm. She was astounded at his conduct, and turning asked him what he wanted with her. Mr. Newton: Did the gentleman complain to you in her hearing? Endacott: Yes, sir. Mr. Newton: What are you? The prisoner: A dressmaker. A lady here stepped into the witness-box and said that she was the prisoner's employer, she had a large establishment near to Oxford Street, and the accused was her forewoman. Mr. Newton: Can you account for this woman walking Regent Street? The employer: It is a mistake, sir; she has been in my service three weeks, and has never been out of doors until last night, when she told me she wished to make some purchases for herself. The policeman (Endacott) has been to my house about it, and I consider that he made an improper accusation against my forewoman; he said: I want to know what your lodger is, as she has been walking the streets for an improper purpose. I told him she was not doing any such thing. Mr. Newton: I

think she was. The employer: Oh no, it is quite a mistake, she has never been out of my house before. Mr. Newton: She was out last night. Stand down, if you please. The employer: I say that she was not out for such a purpose. Mr. Newton: I say yes. The employer: I do not understand what you mean.

'Mr. Newton (addressing prisoner): Now just take my advice. If you are a respectable girl, as you say you are, don't walk Regent Street and stop gentlemen at ten o'clock at night. If you do you will be surely fined or sent to prison, after this caution I have given you. The accused then left the court with her friends.'

The matter, however, did not stop here. In the opinion of the majority of people there had been a gross miscarriage of justice, and on July 1 the case was mentioned in Parliament by Mr. Atherley-Jones.

As the Government did not appear anxious to move in the matter, on July 5 Mr. Atherley-Jones moved the adjournment of the House to consider the whole question, and on division the Government were beaten.

Accordingly an official inquiry into the case was ordered, whilst on July 20th, Sir Charles

Warren, the Chief Commissioner of Police, issued an order directing that no prostitutes or others soliciting in the streets should be taken into custody unless the person or persons complaining should attend, and give the person in charge.

The outcome of the official inquiry was to clear Miss Case's character from the wicked slur which had been cast upon it, and the policeman Endacott was tried for perjury, but was acquitted.

From that time forward the police have not arrested women for soliciting, unless charged by some person, who is willing to attend the police court and give evidence, a safeguard to the liberty of the subject, the necessity of which the case we have cited above will prove.

CHAPTER III

WOMAN IN PRIVATE RELATIONS

Daughter.—Tendency of legislation to restrict parents' rights over their children—Custody of Infants Act—Power of court to remove children from immoral surroundings—Act of 1891—Parents' right to chastise children in a reasonable manner—What is 'a reasonable manner'?—Police court decision—Uncertainty of the law with regard to the proper mode of chastising schoolgirls—Illegitimate children—Bastardy Acts.

Wife.—Wife allowed to give evidence against her husband in most civil actions, and in many proceedings of a penal nature—No longer bound to stay with her husband, nor can he restrain her liberty—Regina *v.* Jackson—Alterations in the law with respect to the property of married women—Act of 1857—Protection orders—Act of 1861—Married Woman's Property Act, 1870—Married Woman's Property Act, 1882—Wife's right of maintaining an action in her own name—Liability of husband under the above Acts—Married women liable to bankruptcy—Can under certain circumstances take criminal proceedings against her husband—Liable to support her pauper husband.

THE common law rights of a parent over his children were during this period considerably curtailed, the State frequently stepping

in between parent and child, in order to enforce measures which it considered to be for the child's benefit.

It will be remembered that, according to the common law, the mother had no legal power over her child during the father's lifetime, and before 1839 it often happened, that on the death of the husband the children were handed over to the guardian nominated in the will, and the mother could be debarred from seeing them.

In that year, however, an Act was passed to amend the law relating to the custody of infants, whereby a Judge in Equity, upon petition of the mother whose infants were in the sole custody of the father or guardian, might make an order allowing the mother to visit her children at stated times; whilst if such infants were under seven years of age, they were to be delivered over to her, but no mother against whom adultery had been established was to benefit by this Act.

Not only can the court appoint a guardian to an infant possessed of property, but by an Act of 1840 it has the power to take any infant (whether possessed of property or not) who has been convicted of felony out of the control of parent or guardian, and place him with such

guardians as is deemed expedient. We may also mention, that similar powers are conferred upon the court by the Criminal Law Amendment Act of 1885.

In order to deter parents from withdrawing their children from homes and other philanthropic institutions into which they had allowed them to go rather than support them, an Act was passed in 1891 dealing with this matter. It enacts that where a parent applies to the High Court for the production of his child, and the court is of opinion that he or she has abandoned or deserted it, the court is not bound to issue a writ of Habeas Corpus, and hand the child over to the care of the parent. Previously to this Act, it often happened that a mother would allow a philanthropic institution to take her young children off her hands. She would make no inquiry after them until they were of an age to earn wages, and then, with the idea that they would contribute to her support, she would apply to the court for the production of the children, and demand that they should be given over to her.

The power of parents to chastise their children, or to delegate this authority to a school-master or mistress, provided the chastise-

ment be given in a reasonable manner, is, so far as authorities go, still the law.

As to what is to be deemed a reasonable manner, however, a case which came before Mr. Denman at the Westminster Police Court in December 1895, suggests that a judge's decision upon this point would be desirable. We will give the case as reported in the *Times* of December 19, 1895.

'At Westminster a case of alleged improper chastisement in Cooks-ground, Chelsea, Board School, was investigated before Mr. Denman, the head-mistress, Mrs. Hooton, being summoned for assaulting Ada Newman, a pupil thirteen years of age. Mr. T. A. Organ was counsel for the defence. The complainant gave evidence that on December 9 she turned out a staircase gas-jet as the scholars were leaving. She was aware that there had been complaints of the gas-jets being wilfully extinguished, but in this instance it was flaring, and she turned it out accidentally in an endeavour to reduce the light. The following morning when she attended school, the defendant ordered her to her room to receive punishment for tampering with the gas. Witness refrained from holding out her hand when ordered. Miss Mather, an

assistant mistress, held her hands whilst defendant caned her on the back. Three other teachers were fetched up, and witness was then laid across a table and thrashed with the cane, her clothes being held back for the purpose. In cross-examination the girl admitted that she struggled and kicked one of the teachers, and that she was insubordinate in the afternoon. Mr. Organ urged that the chastisement was not excessive or improper under the circumstances. The girl was guilty of a most serious offence, for in a school of four hundred and sixty children the wilful turning out of the gas might have caused a fatal panic. For the defence a number of assistant teachers were called to show that the caning was administered without passion and with the left hand. Dr. A. Hanks, of Edith-grove, Chelsea, said that he examined the girl on Tuesday, and found no marks of the flogging. Mr. Denman: That was a week afterwards? The doctor: Yes, sir. Answering the magistrate, Dr. Hanks said that such a form of punishment to a hysterical girl would be very prejudicial. Complainant was not delicate. Mr. Denman said the case was of some importance, especially in view of the fact that the school attendance was compulsory.

'There was no doubt that the girl deserved punishment, and if she had been caned on the hand there would have been no objection. He was not prepared to say what the punishment should have been when she would not hold out her hand, but he was unable to say that it was a proper form of chastisement for a girl of thirteen to be flogged in the manner described. If it had been a boy it would have been a most proper procedure, for there was no undue violence or anything of the sort. He gave the school-mistress full credit for moderation and restraint of temper; she had acted honestly and *bonâ fide*, but still in his opinion it was an error of judgment. There was no excessive cruelty, but until he was overruled by a higher tribunal, he should hold that such a form of chastisement to a girl was not permitted by the law. In all the circumstances, though deciding that there had been a legal assault, he should exercise the power he possessed under the Summary Jurisdiction Act, and should not impose any punishment. Mr. Organ: Will your worship say that it is only a technical assault? Mr. Denman: I have practically said so. Mr. Organ asked if a case might be stated for a superior court. Mr. Denman: If you apply for it I will consider it.'

On the supposition that Mr. Denman's view were to be upheld on appeal, a mother who punished her daughter *cotillons retroussés* would commit an assault, for if the law holds that a school-mistress cannot inflict such a punishment, then neither can a mother. And for this reason. The school-mistress is allowed to correct her scholars, because she stands in the parent's place, and what would be considered an improper mode of correction in the one case would, we take it, be considered so in the other.

As to illegitimate children, the law has undergone considerable change during the last fifty years. The tendency of the more modern Acts of Parliament dealing with this subject, has been to force the putative father to contribute to the support of the child, the chief Acts being passed in the years 1845, 1872, and 1873. The law of bastardy may briefly be summed up as follows:—The mother is entitled to the custody of the child, in preference to the father, and is primarily liable to maintain it, until it attains the age of sixteen, gains a settlement in a parish of its own right, or if a female, marries; whilst if the mother marries, this liability attaches to her husband.

If she cannot support it, she may either

before the birth of her child, or at any time within twelve months afterwards, make an application to a Justice of the Peace, charging a person by name as the father of such child, and where the putative father has within twelve months next after its birth paid a sum for its maintenance, such application may be made at any time after its birth.

The outcome of such application is to bring up the party so charged, and the question of paternity is heard. If the evidence of the mother as to the paternity of the child is satisfactory to the court, it may adjudge the person so summoned as the putative father, and an order may be made that he shall pay to the mother, or some other person to be appointed for the custody of the child in the event of her death, insanity, or imprisonment, a weekly sum of money, until the child shall die, or attain the age of thirteen, or sixteen, as the court may think fit.

Wife.—As but little or no alteration has taken place in the laws relating to the celebration of marriage, we will pass on to consider the important changes which have occurred during the last fifty years in the legal position of a married woman.

We have seen that the law during one period would not admit a wife or husband to give evidence against each other, even in civil proceedings, but this rule has now been practically abolished; for by certain Acts of Parliament, passed respectively in 1841, 1843, and 1869, the husbands and wives of the parties to the proceedings were made both competent and compellable to give evidence, save in criminal proceedings.

This last exception, however, did not include cases of high treason, nor where the husband was indicted for personally injuring his wife, and does not now include many proceedings of a *quasi* penal nature, such as proceedings under the Licensing Act, Sale of Food and Drugs Act, etc., and all proceedings under Section 12 of the Married Woman's Property Act, 1882.

In no case, however, is a husband compelled to disclose any communication made to him during marriage by his wife, or any wife to disclose any communication made to her during marriage by her husband.

The right to inflict corporal punishment upon his wife was, we have seen, taken away from the husband in the seventeenth century. There still remained, however, in the opinion of most

authorities, yet another right over her person, viz. that of restraining her liberty if he so thought fit.

During the year 1891, a case came before the court which destroyed this last vestige of the husband's authority over his wife's person. This case, briefly stated, was as follows:—Mr. Jackson, shortly after his marriage to Emily Emma Maude Jackson, had occasion to visit New Zealand, where it was his intention finally to settle, his wife having arranged to come out to him at a later date.

During his absence, however, Mrs. Jackson went to reside with her sisters and brother-in-law, and while on her visit wrote to her husband pressing him to return. This he did, and on his arrival in England she refused to live with him. Hereupon Mr. Jackson commenced proceedings in the Probate and Divorce Court for restitution of conjugal rights, and obtained a decree, and though subsequently he again endeavoured to persuade her to return to him, she refused to consent.

Matters went on like this for some time, until one Sunday in March 1891, when Mrs. Jackson was leaving a church at Clitheroe, in company with her sister, Mr. Jackson, assisted by two

young men, seized her, and in spite of her cries and struggles conveyed her to a carriage which was in readiness. The carriage was at once driven to Mr. Jackson's house in Blackburn, and Mrs. Jackson placed under the charge of his sister and a nurse. In this state of confinement she was kept until a writ of *habeas corpus* was applied for, and she was brought up into court.

It was contended by counsel for the husband, that a husband had a right to restrain the liberty of his wife, a view of the law, however, which the court refused to accept, and decided, that legally no wife was bound to stay with her husband, nor could a husband use force to prevent her leaving him, that the return to the writ was bad, and that Mrs. Jackson was to go free.

But by far the greatest change which has come over the position of a married woman is with respect to her property.

So early as 1857 the hard position in which the law placed a married woman in this respect, was in some degree remedied by an Act passed in that year. It provided that a deserted wife might at any time after desertion apply to a police magistrate for a protection order, and

after that order was granted, any money or property which she might acquire by her lawful industry, or become possessed of after his desertion, became *protected*, and belonged to her, as if she were a single woman, nor could the husband if he returned in any way interfere with it.

This Act was followed in 1861 by another, whereby any woman whose husband had been convicted of an aggravated assault upon her, might by a magistrate's order be exempted from the liability to cohabit for the future with her husband, and with respect to property was in the position of a single woman.

Up to now the law had only relieved deserted or assaulted wives, but in 1870 the Married Woman's Property Act was passed, which applied equally to all married women. The principal provisions of this Act being briefly as follows—

All the earnings of a married woman were to be deemed her own property, as also were her deposits in any Savings Bank.

Any married woman, or woman about to be married, having £20 or more invested in the Bank of England, Ireland, or a Joint Stock Company, or Benefit Society, might have this

sum transferred upon the books to her name for her separate use, such sum being deemed her separate property.

All personal property coming to a married woman, not exceeding £200, to be her own.

The rents and profits only of all freehold property coming to her to be her own.

Every married woman allowed to insure her own or her husband's life for her separate use.

Revolutionary, no doubt, as this Act was considered at the time, it was as nothing when compared with the Married Woman's Property Act of 1882, by the provisions of which she could acquire, hold, and dispose of property in the same way as could a single woman.

By this Act all property belonging to a woman (married on or before January 1, 1883) at the time of her marriage, or which comes to her after marriage, including earnings and property acquired by the exercise of any skill or labour, is absolutely her own.

She can now acquire, hold, and dispose of any property, real or personal, as her separate property, as if she were a single woman, without the intervention of any trustee. In fact, at the present day, the law gives the husband no rights whatever over the property of his wife.

Not only has the law allowed married women to possess property, but it has likewise taken away many of the disabilities under which she formerly lay.

Previously to the year 1870, a married woman was unable to sue, save in the joint names of herself and husband, but this Act allowed her to maintain an action in her own name, and without her husband's concurrence, with regard to all property called by the Act separate property, or property belonging to her before marriage, which the husband had by writing under his hand agreed should belong to her after marriage.

The 1882 Act went further than this, and allowed her to maintain an action, or be made a defendant thereto, in her own name, in respect of all property declared by that Act to be separate property, and generally to contract and do all other things relating to her separate property as if she were a single woman.

It would appear that a married woman trading on her own account may be made a bankrupt, but she cannot be committed to prison for non-fulfilment of an order under the Debtor's Act of 1869.

With regard to the liability of the husband

for his wife's ante-nuptial contracts (such as debts, for instance), or torts, or civil wrongs (such as slander) committed by her before marriage, the date of the marriage determines his liability. If the parties were married before August 9, 1870, he is liable in both instances, whether he received any assets (money, etc.) with her on marriage or not. If between August 9, 1870, and July 30, 1874, any debts which she may owe or other contracts, he is liable for, but he is not so for her torts. If the marriage took place between July 30, 1874, and December 31, 1882, his liability both for contracts and torts is only to the extent of any assets he received with her, or might have received with her by using due diligence; whilst if the marriage was after December 31, 1882, he is only liable for her ante-nuptial contracts and torts, to the extent of the assets which he actually received or became entitled to.

Under Section 12 of the 1882 Act, every married woman has the same remedies, civil and criminal, against all persons, including her husband, for the protection of her separate property, as if she were a single woman.

In the same way a husband has a right to take criminal proceedings against his wife for any

act of hers which, if done by the husband, would make him liable to criminal proceedings by his wife, and in enforcing such remedies husbands and wives are competent witnesses against each other.

No criminal proceedings, however, are to be taken by a wife against her husband, or *vice versâ*, unless they be living apart, or unless the property was wrongfully taken when the husband or wife was leaving, or about to leave, his wife or her husband, whilst in no case, save in the above, can a wife or husband sue the other for a tort.

This Act also places a liability upon a married woman to support her pauper husband, under the Poor Law Amendment Act, out of her separate estate, as well as to maintain her children and grandchildren in the same manner as the husband is liable to do, but not so as to relieve the husband of responsibility.

It will be seen that by these Acts the position of a married woman is entirely changed from what it was even less than fifty years ago.

The old theory that man and wife are one in the eye of the law is completely exploded. He can no longer beat her, or even compel her to

cohabit with him, whilst his command over her property no longer exists, and unless a sum of money be settled upon him before marriage, she is not bound by law to allow him a single penny piece out of her separate estate.

CHAPTER IV

DIVORCE, ETC.

Jurisdiction in matrimonial matters taken from ecclesiastical courts—Division of High Court of Justice formed for hearing matrimonial causes—Divorce *à mensâ* abolished—The judicial separation—Power of court to dissolve marriage for post-nuptial offences—Grounds for divorce—Alimony—Custody of children—Actions for criminal conversation abolished—Husband's right to damages—Restitution of conjugal rights—Nullity—Jactitation—'Police court separations'—Summary Jurisdiction (Married Women's Act), 1895.

UP to the year 1857 the law governing divorce remained in the same state as it was in the year 1697, viz. Parliament alone had the power to dissolve a marriage for post-nuptial offences, and only exercised this power for the benefit of innocent husbands.

By the Divorce Act, passed in the twentieth year of Her Majesty's reign, the jurisdiction of the ecclesiastical courts in matters matrimonial was abolished, and a division of the High Court of Justice formed, in which all matrimonial causes were to be heard and determined.

The same Act did away with the divorce *à mensâ*, but introduced in its place the judicial separation, which decree may be obtained upon the petition either of the husband or wife, and has all the effect which belonged to the divorce just mentioned.

The grounds for this decree are adultery, cruelty, or desertion without cause for two years or upwards, and so long as the decree continues the wife can acquire as to property, and for other matters, the condition of a single woman.

With regard to the dissolution of marriage, although the Act did not do away with the remedy of a private bill, the new court was empowered to make these decrees under the following circumstances:—

When the husband is petitioner, it can be made on the ground, that since the marriage the wife has been guilty of adultery.

When the wife brings the petition, she has to prove, in order to obtain her decree, that since the marriage her husband has been guilty of (1) incestuous adultery; (2) bigamy, with adultery; (3) rape, or unnatural crime; (4) adultery coupled with such cruelty as would, without adultery, formerly have entitled her to

a divorce *à mensâ* from the ecclesiastical court; or adultery coupled with desertion, without reasonable excuse, for two years or upwards.

The court, however, will not, as a rule, dissolve the marriage if the petitioner (whether husband or wife) has been accessory to, or connived at, or condoned the adultery, nor if collusion between the parties can be proved. Nor is the court bound to decree divorce, if the petitioner is found to have been guilty of adultery during the marriage, or of unreasonable delay in presenting the petition, or if either party has been guilty of cruelty to the other, or of desertion, or wilful separation from the other before the adultery, without reasonable excuse, or of such wilful neglect or misconduct as may have conduced to the adultery.

The above decree, in the first instance, is always *nisi*, and is generally not made absolute until six months from the pronouncing of such decree.

The object of this is to give the Queen's Proctor, or other person acting through him, an opportunity to show cause why the decree should not be made absolute, either on account of collusion, or that some material facts have been withheld from the court in the course of the trial.

Both on a decree for judicial separation, on the wife's petition, and on a decree for dissolution, an order may be made for alimony to the wife, and the court is also empowered to direct that the custody of the children of the marriage, if of tender years, be given either to the innocent party, or even to a third party, if the court so think fit. Moreover, if the guilty wife or husband be entitled to any property, an order may be made with regard to a settlement thereof for the benefit of the innocent party, and the children of the marriage; whilst after a final decree of dissolution, an inquiry may be ordered to take place into the existence of any ante-nuptial or post-nuptial settlement made on the parties whose marriage is decreed dissolved, re-settling the whole or a portion of the property, either for the benefit of the children or of the respective parents.

The old action for criminal conversation was abolished by this Act, but a husband may in his petition claim damages against a co-respondent, though a wife is unable to lay any claim for damages.

The effect of a divorce under this Act differs from that obtained by the old method of private bill, in that it does not bastardize the issue,

which was generally the case when a marriage was dissolved by Act of Parliament.

The court has also the power to decree restitution of conjugal rights. Thus, if a husband or wife refuse to cohabit for no reason save caprice, the court can make an order directing him or her to return, provided a written demand for cohabitation have been previously made.

Before the year 1884, if the party did not obey this order, he or she was liable to be committed to prison for contempt, but an Act passed in that year abolished imprisonment for refusing to cohabit, making such refusal a ground for a judicial separation. If the order be obtained by the wife, and the husband, after separation, commit adultery, the court allows the wife to petition for a divorce on the ground of adultery coupled with desertion, although the desertion in this case may not be for two years.

A power to decree nullity of marriage is also conferred upon the court, and may be obtained upon any ground which would formerly have justified such a decree from the ecclesiastical court, and a divorce *à vinculo* consequent thereon.

Suits for jactitation of marriage can likewise

be commenced in this division, but they rarely come before the judge at the present day.

By the same Act, power was given to the court or a magistrate to decree what is equivalent to a judicial separation in the following circumstances :—A wife whose husband had been convicted in a criminal court of an aggravated assault upon her, was to be no longer bound to cohabit with him, if, in the opinion of the court, or magistrate, such cohabitation was likely to imperil her life; and an order might be made for the husband to pay a certain weekly sum to her, as well as giving to her the custody of all the children under ten years of age. Two other Acts, dealing with what may be termed 'police court separations,' are the Matrimonial Causes Act 1878, and the Causes of Desertion Act 1886. As, however, these Acts have been virtually repealed, so far as they relate to this matter, by the Summary Jurisdiction (Married Women's) Act 1895, we shall not trouble the reader with their provisions, but shall give briefly a summary of the last-named Act, which came into operation on January 1, 1896.

It is provided by this Act, that any married woman whose husband shall have been convicted summarily of an aggravated assault upon

her, or shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than five pounds, or to a term of imprisonment exceeding two months, or whose husband has deserted her, or shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children, whom he is liable to maintain, and shall, by such cruelty or neglect, have caused her to leave and live separately apart from him, may apply to any Court of Summary Jurisdiction in which such conviction has taken place, or in the district in which the cause of complaint (such as the desertion, etc.) shall have wholly or partially arisen, for an order or orders under this Act. These orders are as follows:—(1) A provision that the applicant be no longer bound to cohabit with her husband, the effect of this being equivalent to a decree of judicial separation. (2) A provision that the legal custody of any children of the marriage, between the applicant and her husband, while under the age of ten years, be committed to the applicant. (3) That the husband shall pay to the applicant personally, or, for her use, to any officer of the court, or third person on her behalf, such weekly sum,

not exceeding £2, as the court shall, having regard to the means both of the husband and wife, consider reasonable.

It is expressly enacted, however, that no order shall be made under this Act on the application of a married woman, if it shall be proved that such married woman has committed an act of adultery, provided the husband have not connived at, nor by his wilful neglect or misconduct conduced to such an act of adultery.

CHAPTER V

SUMMARY

ON looking at the legislation affecting woman which has been passed during the last fifty years, one is at once struck with the novelty of the principle upon which the greater part of such legislation is based. We see the law give to woman a voice in the government of the country (for the mere fact of her having a vote in parochial, municipal, and other matters constitutes her a power to be reckoned with in the domestic government of the nation); we find professions which previously refused her admission, willingly open their doors to admit her; we note a marked change in the position of the married woman, which forty years ago was one nearly allied to that of honourable servitude, a change whereby the wife has been placed almost upon an equality with her husband; and with such radical alterations in the laws governing women staring us

in the face, we naturally ask how this great change came about.

The answer, however, is by no means an easy one. It has been suggested that the rapid strides which the nation made in education during the first half of the century has chiefly contributed to this change, and there can be no doubt that education did in a manner help to bring about these alterations. Yet we think it is necessary to go back to the close of the eighteenth century, in order to find one of the chief causes which wrought this effect upon our laws. We allude to the French Revolution. Upon the sweeping away of the French monarchy, the temporary abolition of the Church, with the introduction of the rights of man, a plea was raised for the rights of woman. So hateful was restraint of all kinds in the eyes of the people, so enamoured were they with the idea of liberty and equality, that a doctrine, synonymous in many respects with that of the equality of the sexes, became popular with all classes and with both sexes.

That such a doctrine was taught, and not only taught, but actually carried into practice, any history of the time will prove. The march of the women to Versailles, female patriots

holding forth upon liberty, equality, and fraternity at the street corners of Paris, Charlotte Corday and the bleeding corpse of Marat in the Rue de l'École de Médecine, these and other instances, where women played the part of men, prove that the sex had, for the time at least, thrown aside the old theory that they could do nothing by themselves, and that nothing save the duties of the household was expected from them.

And this idea, in a limited sense, took root in England. With reform bills, extension of the franchise, trade unions, the theory that the rich man had a duty to perform to his poorer neighbour, all more or less the outcome of the French Revolution, came the idea that woman, either married or single, was in justice entitled to more rights and liberties than the law had up to then granted her. That it took several years ere it had any effect upon legislation is not surprising, less surprising perhaps in England than in any other country, because of the innate conservatism of its people, who refuse all reforms until they are thoroughly satisfied that such are the wishes of the majority.

But the change came, by degrees it is true, but none the less surely on that account, and

the majority of men, as well as of women, agreed that the change in the law was a change for the better and not for the worse.

In another part of this volume we have referred to the importance of woman being allowed to engage in trade, because by being in a position to earn her own living she became independent. The importance of the mere fact of her being independent, however, though it gave her more opportunities to call attention to what she considered to be the wrongs of her sex, has perhaps been over-estimated. But the fact that she was capable of carrying on a business, and carrying it on successfully, that she was possessed of sound judgment, and no more liable to be imposed upon than a man, dealt a severe blow at the argument, which said that woman ought not to have a voice in the government because she did not understand business, save that connected with the kitchen and the nursery.

How long this argument, which was common some forty years ago, would have lasted had woman been debarred from carrying on a trade, it is impossible to say, for arguments of this kind die very hard, but that the successful milliners, lady novelists, *et hoc genus omne*,

killed this argument amongst them, we have very little doubt.

On the other hand, it is very questionable whether woman has ever gained any great concessions by direct agitation. If we look back, and note the numerous changes in the laws concerning women, how many of these changes are attributable to women themselves? One cannot very well conceive a greater injustice to woman than the law which governed the plea of benefit of clergy. Before this plea was abolished, women as well as men were allowed to plead it. Yet we have never come across any passage in history which leads us to suspect that any pressure was brought to bear upon the legislature by women for this purpose. Take the Act which was passed in James I.'s reign relating to the crime of concealment of birth. An Act more hostile to women one cannot well imagine, and though it was repealed in 1803, women did not petition for its repeal.

Was it because of an outcry raised by women themselves, that after the year 1790 a woman found guilty of murdering her husband ceased to be burnt at the stake, or that thirty years later an Act was passed which forbade

the flogging of women either in public or private?

It may be said that women, though not taking an active part in bringing about these changes, exerted an influence over men which was no mean factor in introducing these alterations in the laws. This may have happened in individual cases, but what did the majority of women of the seventeenth and eighteenth centuries care about social legislation? And even if they had cared sufficiently to have given their views on these subjects, who would have listened to them?

If, then, women themselves did not bring about these alterations, to whom or to what are we to attribute them? We think, unquestionably, to the progress of civilization. From the eleventh century to the present day the nation has been steadily progressing in civilization, and throughout the same period the position of woman has steadily improved; not because women themselves have helped in the making of the laws, but because all men and women have become more enlightened, more refined, and have had their ideas broadened by education, travel, and the arts of peace.

That the laws were cruel and harsh to

women during many centuries, was not because they were made by men, but because they were made by a majority of ignorant and often semi-civilized and brutal men, compared with whom the women of the period were only a little, if at all, more civilized or less brutal. Until it can be shown that all the reforms in our laws concerning women were brought about through the agency of women themselves, the argument contained in Mrs. Browning's lines anent 'Women sobbing out of sight, because men made the laws,' loses its force, whilst to expect that semi-civilized men should legislate with the same amount of equity and foresight as their more cultured and refined great-grandchildren, is to expect figs from thistles, or snow in midsummer.

That woman has attained to the legal position which she now holds, few people, we think, will regret, for the old idea of her incapacity for business, her shallowness of character, and the inferiority of her talents, is rapidly breaking up and vanishing, together with other old-fashioned opinions which experience has proved to be erroneous.

Many people, however, look with distrust upon the more advanced section of woman, of

whom so much has been heard of late, and are apt to credit the legislation of the past half-century with the responsibility of having begotten her. They assert, somewhat meanly we must admit, that she is competing, perhaps too successfully, with man in many walks of life, that she has shaken off the parental or fraternal control, and has even gone so far as to endeavour to do without his aid in her struggle through the world.

All this doubtless may be very true, but we question whether it be the fault of recent legislation. A glance at the census returns, however, may provide us with an explanation, and what has been laid to the charge of legislation, may prove to be in reality the outcome of the marked increase in the proportion of females over males which has occurred during the last twenty years.

This preponderance of females will go some way at least towards explaining why so many women follow callings such as medicine, art, journalism, typewriting, and all the numerous female avocations which have sprung up during the last twenty years. In every country where the females are more numerous than the males, polygamy not being customary, there must

always be a large number of women who will never marry. In an age when education is almost universal, it is not to be expected that, even if these women have incomes upon which they can live, they will remain passive and unemployed for the remainder of their lives. On the contrary, they take up with some branch of art, literature, science, or social work. The great majority, however, must, in order to gain a living, obtain employment of some sort. So great is the number, that the old openings for higher female labour, such as teaching, etc., have long since been filled to overflowing, and other callings are assailed in which hitherto man only has been employed, but to which woman, armed with education, gains admittance. And having gained admittance, and thereby earning her bread, is it unnatural that she should resent the old order of things which forbade her to do this or that, because she was a woman?

Recent legislation may be answerable for much, but it is certainly not answerable for this, nor do we think any legislation, no matter how stringent, could have prevented this from happening. Public opinion, it is true, has often affected legislation, but no legislation has

ever yet, or in all probability ever will, affect public opinion.

With regard to the future, judging from the past, it is not unlikely that even further rights will be conferred on the female sex. Provided the country remain at peace, we have no doubt that the parliamentary franchise must sooner or later be extended to woman; and when this occurs, provided a few minor disabilities which the law still places upon married women, and the legal inability of all women to fulfil certain posts, be removed, woman, whether married or single, will stand virtually upon a legal equality with man.

Whether or not this be a 'consummation devoutly to be wished' is a matter of opinion, but when these further rights are conferred, this will not be because they are demanded by an importunate section of woman, or by the sex collectively, but because, in the opinion of the majority of men, as well as of women, it will be just and equitable to confer these rights upon them.

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